pany; Chicago and North Western Railway Company; Chicago, St. Paul, Minneapolis & Omaha Railway Company; Northern Pacific Railway Company; Great Northern Railway Company; The Atchison, Topeka and Santa Fe Railway Company; Wabash Railroad Company; Washington Public Service Commission; Public Utilities Commissioner of Oregon; Board of Railroad Commissioners of the State of Montana; State Board of Equalization and Public Service Commission of Wyoming; State of Nebraska and Nebraska State Railway Commission, submit herewith their statement[1] particularly disclosing the basis upon which this Court has jurisdiction on appeal to review the judgment of the district court entered in this case on December 20, 1954.

Opinions Below

The report of the Interstate Commerce Commission is found in 287 I. C. C. 611, and is attached hereto as Appendix B. The majority opinion of the three-judge district court, and the dissenting opinion of Circuit Judge Johnsen, were filed October 22, 1954, and have not been reported, but are attached hereto as Appendix D. The court's findings of fact and conclusions of law are set forth in the majority opinion.

Jurisdiction

This action was brought in the District Court of the United States for the District of Nebraska by the Union

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1 Counsel for these appellants fully appreciate the desirability for brevity and the requirement of this Court's Rule 15 for conciseness in preparing jurisdictional statements. The geographical, physical and other facts essential to an understanding of the case and material to consideration of the unusual number and variety of questions presented are, however, so involved and voluminous as necessarily to extend this statement beyond the length ordinarily required in less complicated cases.

Pacific Railroad Company and seven other railroads pursuant to 28 U. S. C. 1336, 1398, 2284 and 2321-2325, to enjoin, annul, suspend and set aside the order issued January 12, 1953, by the Interstate Commerce Commission in a proceeding entitled "Docket No. 30297, Denver & Rio Grande Western Railroad Co. v. Union Pacific Railroad Co., et al."

The order (Appendix C hereto) was issued upon a complaint filed with the Commission by The Denver & Rio Grande Western Railroad Company (hereinafter called "Rio Grande"). It requires, among other things, that the railroad appellants herein[2] and over 200 other railroads establish and maintain through routes and joint rates in connection with the Rio Grande "the same" as the joint rates maintained by them over transcontinental routes embracing the lines of the Union Pacific Railroad Company through Wyoming on certain commodities that move by railroad between points in the northwest area and points in the eastern and southern areas described in the order.[3]

The order presents the unique situation of an attempt by the Commission to short haul the railroads that have the shortest and most efficient routes and lowest rates by compelling them to establish longer and more onerous through routes and equal joint rates in connec-

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2 The railroad appellants herein were among 221 railroads named in the Rio Grande's complaint to the Commission. The public service commissions of the five States, appellants herein, intervened in opposition to the Rio Grande before the Commission, and as plaintiffs in the court below.

3 The lines and termini of the Union Pacific and the Rio Grande (main lines) are indicated on the map attached hereto as Appendix A. Figures in the oblongs on the map show the number of additional miles shipments would move via the Rio Grande compared to mileage via Union Pacific.

tion with the Rio Grande, a short-line railroad, so that it can divert traffic for a "bridge" haul over its line. The Commission's action has implications of vital and far-reaching future effect not only upon the appellant railroads and the economic welfare of shippers and communities served by them in the five appellant States but also upon shippers in communities located upon long-established routes and channels of commerce of the larger railroads generally throughout the country.

Final judgment and decree of the majority of the district court sustaining the validity of the order "in part" and enjoining it "in part" is dated and was entered December 20, 1954. On the same day the district court entered an order in which it "overruled and denied" a motion of the Rio Grande and a motion of these appellants for new trial and reconsideration. The district court also on December 20, 1954, issued an "Injunction Pending Appeal", staying, suspending and restraining enforcement of the Commission's order pending final determination of this appeal. Copies of these documents are attached hereto as Appendices E, F and G, respectively.

Notice of appeal was filed by these appellants in the District Court of the United States for the District of Nebraska on February 18, 1955.[4] On March 22, 1955, an order by Circuit Judge Johnsen, who was the presid-

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4 Notice of appeal from the judgment of the district court in this case was also filed:

1. By The Denver & Rio Grande Western Railroad Company, February 3, 1955.
2. By the United States of America, February 17, 1955.
3. By the Interstate Commerce Commission, February 18, 1955.
4. By the Secretary of Agriculture of the United States, February 18, 1955.

ing member of the three-judge district court, was entered extending to June 1, 1955, the time for filing the record and docketing the cases of all appellants in this Court. Copy of that order is attached hereto as Appendix H.

The jurisdiction of this Court to review the judgment by direct appeal is conferred by 28 U. S. C. 1253 and 2101 (b).

The following decisions sustain the jurisdiction of this Court to review the judgment in this case on direct appeal: *United States v. Mo. Pac. R. Co.*, 278 U. S. 269; *Pennsylvania R. Co. v. U. S.*, 323 U. S. 588; *Thompson v. United States*, 343 U. S. 549; *U. S. v. Great Northern R. Co.*, 343 U. S. 562; *I. C. C. v. Columbus & Greenville Ry.*, 319 U. S. 551; *U. S. v. Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499; see also *Interstate Comm. Comm. v. Nor. Pac. Ry.*, 216 U. S. 538.

Statutes Involved

This appeal involves the following provisions of the Interstate Commerce Act, Part I, 49 U. S. C. 1, *et seq.*, which are set out verbatim in Appendix I, hereto:

National Transportation Policy (preceding Section 1), and Sections 1 (3) (a), 1 (4), 1 (5), 3 (1), 3 (4), 15 (1), 15 (3) and 15 (4).

Questions Presented

The following questions are presented by this appeal.[5]

I. Whether the court below erred in refusing to hold that, in this proceeding, brought by the Rio Grande for the admitted purpose of enhancing its financial position by diverting for a "bridge" haul over its line transcontinental through traffic now and for some 75 years moved over Union Pacific routes between points on those routes in the northwest and points in the eastern and southern parts of the United States, the Commission was prohibited from issuing the order by the provision of Section 15 (4) of the Interstate Commerce Act that, "No through route and joint rates applicable thereto shall be established by the Commission for the purpose of assisting any carrier that would participate therein to meet its financial needs," and that this prohibition may not be evaded or circumvented by the Commission's assertion that in making the order "no consideration has been given to the financial needs" of the Rio Grande.

II. Whether the court erred in refusing to hold that, in view of the short haul prohibition of Section 15 (4) of the Act (49 U. S. C., § 15 (4)), the Commission acted arbitrarily and unlawfully in issuing the order

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5 The plurality of questions presented by this appeal results from the Rio Grande's commingling in its complaint of separate and independent provisions of the Act concerning its rights as a carrier, the rights of shippers, and the "public interest"; also from what Circuit Judge Johnsen's dissenting opinion aptly decribes as "all the confusion in which the (Commission's) report is wrapped", "the loose and improper basis and manner in which * * * the Commission has dealt with the entire situation", and from the further confusion and apparent misconception of the majority of the district court concerning its judicial functions in reviewing the order.

short-hauling Union Pacific routes at least 925 miles, upon the Commission's own findings of fact:

(a) That Union Pacific routes have lower rates than the Rio Grande and are shorter, faster, efficiently operated, adequate and have surplus capacity to haul any foreseeable volume of the through traffic involved;

(b) That movement of the same through traffic via the Rio Grande would require over 200 miles additional transportation, at least 24 hours more time in transit, and one or two additional interchange services; and that the Rio Grande maintains higher rates, is less favorably located and has more onerous operating conditions than the Union Pacific or any of the other western lines.

III. Whether the court erred in failing to hold that the entire order is void because the Commission misconstrued, departed from and failed to observe and make the findings required by the controlling statutory standards and criteria of Sections 1 (4), 3 (1) and (4) and 15 (3) and (4) (b), in basing its order:

(a) Upon the premise that the standards and conditions of Section 15 (4) (b) [which permit establishment of a proposed route short-hauling existing routes of other railroads, *only* if "the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic transportation"] are lawfully observed and applied by the Commission's findings here:

1. of a need for "more" adequate and economic service than that afforded by Union Pacific routes, and

2. that the Rio Grande route is "necessary and desirable" to provide "adequate and more economic transportation",

without any finding by the Commission that the Rio Grande route is "needed" or that it will provide "more efficient" transportation than Union Pacific routes for the involved through traffic between the same origins and the same ultimate destinations;

(b) Upon the premise that the conditions which permit short-hauling Union Pacific routes under Section 15 (4) (b) can be met and satisfied by merely substituting the lower joint rates applicable over Union Pacific routes for the higher combination rates via the proposed Rio Grande route;

(c) Upon the premise that, under Section 15 (4) (b), Union Pacific routes may lawfully be condemned and found "inadequate and less economical" than the Rio Grande route for through traffic because, *at points located on and served only by the Rio Grande,* "the Union Pacific routes and the joint rates that apply over them are not available, and higher rates apply";

(d) Upon the premise that the Commission may invoke its power under Section 15(3) and (4) (b) for the purpose of making additional transit privileges available by equalizing rates via the Rio Grande with rates applicable over Union Pacific routes;

(e) Upon the criteria that the marketing system for food articles of a perishable nature requires "as wide a distribution as possible", "as many routes as possible", "as much flexibility as possible" and "as many markets and outlets as possible", although Section 1 (4) requires carriers to establish only "reasonable" through routes;

(f) Upon the inconsistent criteria that:

1. food articles of a perishable nature must move to markets "with expedition and care" and "without unnecessary interruptions";

2. the longer Rio Grande route is necessary to permit the through transportation of such articles to be interrupted so that the articles may be held as long as 12 months at points on the Rio Grande for "commercial operations" called transit privileges, and

3. ordinary livestock to stop for grazing or feeding, and marble and granite monuments to stop for partial unloading at points on the Rio Grande fall within the category of perishable food articles found by the Commission to require expeditious, careful and uninterrupted transportation;

(g) Upon the premise that the Commission may lawfully invoke its powers under Section 15(3) and (4) to obtain the remedy it desires for rates found violative of Sections 1 and 3, and that findings of violations of the latter sections afford a lawful basis for ordering the through routes and joint rates.

IV. Whether the court erred in holding that the Commission may require Union Pacific routes to short haul themselves by establishing through routes and joint rates with the Rio Grande for the sole purpose of permitting through traffic to be stopped at points on the Rio Grande, not served by the Union Pacific, for "commercial operations" (known as "transit" privileges), such as storing, processing and cattle grazing, at the same rates the same shippers have when using Union Pacific routes between the same points of origin and the same ultimate destinations.

V. Whether the lower court's finding that transportation service via the *proposed* Rio Grande route is "inadequate and also inefficient and uneconomical" for through shipments requiring transit at points on the

Rio Grande and reshipment to final destinations beyond its termini, affords a lawful basis for the order short-hauling Union Pacific routes under Section 15 (4) (b), which permits short-hauling other railroads only if "the Commission finds that the through route *proposed* to be established is needed in order to provide adequate, and more efficient or more economic, transportation."

VI. Whether the court erred in failing to review and consider the whole record of evidence and all of the issues tendered by the pleadings and arguments of the parties, and in failing to hold that the order is entirely null and void, because:

(a) The order is based upon erroneous interpretations of law, and there is no rational basis or support for the order or any part of it, in the evidence or in the findings made by the Commission;

(b) The Commission *did not make,* and the evidence does not justify or support findings essential to the validity of the order, among others:

1. that Union Pacific routes are inadequate, inefficient and uneconomic for movement of the involved traffic,
2. that the Rio Grande route is "needed" for the involved traffic, and that it will provide "more efficient" transportation service than Union Pacific routes,
3. that diverting traffic and revenues from Union Pacific routes to the Rio Grande would serve such beneficial purpose as maintaining good service or improving it,
4. that the Rio Grande is efficiently operated, furnishes satisfactory service or has surplus capacity or ability to haul any additional volume of traffic,

5. that diverting the traffic to the Rio Grande's longer route will speed up its movement,

6. that the Rio Grande will generate new or additional traffic or contribute additional transportation facilities in the northwest area, or that existing routes are insufficient or incapable of moving the traffic to and from that area,

7. that by including the Rio Grande in the through routes shippers to and from the northwest area will have lower rates than they have via Union Pacific routes,

8. that the overall transportation system of shippers using it would benefit by including the longer Rio Grande line in present routes for a "bridge" haul over its line,

9. that shippers have ever made complaint against service rendered by Union Pacific routes for the traffic involved, or demanded that the Rio Grande be included in present through routes;

(c) The evidence does not support or justify the Commission's findings—

1. that the combination of local rates via the Rio Grande are unjust and unreasonable,

2. that the joint rates which now apply over Union Pacific's shorter and more direct routes are reasonable for application via the longer and more onerous Rio Grande route,

3. that the combination rates via the Rio Grande are unduly prejudicial of shippers and receivers using or desiring to use the Rio Grande route and unduly preferential of shippers and receivers using the Union Pacific routes,

4. that the Union Pacific and other railroads discriminate against the Rio Grande in violation of Section 3 (4) in maintaining joint rates with the Bamberger Railroad at points on its line between Ogden and Salt Lake City, while refusing to make like joint rates with the Rio Grande at the same points,
5. that through routes and joint rates with the Rio Grande are "necessary and desirable" in the public interest to provide "adequate and more economic transportation",
6. that shippers in the northwest producing area (who testified that they sell their products in all markets in all the 48 states and 5 foreign countries) "are debarred from effective participation" in the marketing system because they must pay higher rates if they ship through traffic via the Rio Grande than the joint rates available to them via Union Pacific routes for the same through traffic moving between the same origins and the same destinations;

(d) The Commission arbitrarily refused to give effect to the requirement in Section 15 (4) that reasonable preference be given the originating carriers;

(e) The Commission refused to consider or give effect to the National Transportation Policy and to the evidence showing that diversion to the Rio Grande of any substantial part of the traffic would result in wasteful transportation and economic waste and in serious detriment to Union Pacific service and its employees, to certain other railroads and their employees and would inflict serious economic injury to numerous communities and the public served by Union Pacific routes;

(f) The Commission arbitrarily commingled and misused its authority under, and the remedies for violations of the separate and independent provisions of Sections 1(4), 3 (1) and (4) and Sec-

tion 15 (3) and (4), and its order is vague, uncertain, indefinite and conflicting in its requirements;

(g) Upon its findings that the Rio Grande had not sustained its complaint, the Commission acted arbitrarily and contrary to law in failing to dismiss the complaint and in ordering through routes and joint rates on the theory that because shippers had intervened and testified, the Rio Grande's complaint became a shipper complaint;

(h) The Commission acted arbitrarily and unlawfully in refusing to dismiss the entire proceeding on the ground that it was vitiated and nullified by the fact that shipper witnesses on whose testimony the order is based were admittedly solicited and procured by the Rio Grande to testify in such manner as to help it win its case.

Statement of the Case

The Rio Grande operates a short-line railroad with its eastern termini at Denver, Pueblo and Trinidad, Colorado, and its western terminus at Ogden, Utah, the distance between Denver and Ogden being 607 miles via its main line, and 782 miles via Pueblo (see map, App. A). Its history has been essentially one of financial difficulty and of bankruptcy. It has been a "financial needs" railroad throughout most of its existence.[6]

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6 *Denver & Rio Grande Investigation*, 113 I.C.C. 75; *Reconstruction Finance Corp. v. Denver & R.G.W.R. Co.*, 328 U.S. 495.

Its mountainous location and tortuous physical features have resulted in "operating conditions on the Rio Grande" that are "more onerous than those on the lines of the Union Pacific" or any other transcontinental railroad (App. B, p. 74) and caused the Commission to grant the Rio Grande's demand for higher rates, based on its "financial necessities," than rates prescribed for other western railroads.

Commercial Club, Salt Lake City v. A.T.&S.F. Ry. Co., 19 I.C.C. 218, 221-222; *W. H. Bintz Co. v. Abilene & S. Ry. Co.*, 216 I.C.C. 481, 486; *Livestock-Western District Rates*, 176 I.C.C. 1, 98, and 190 I.C.C. 175; *Utah Coal Operators Assn. v. Atchison, T. & S.F. Ry. Co.*, 218 I.C.C. 663.

Constructed in 1870 as a narrow-gage line and converted to standard gage in 1890, the "Rio Grande was built for the purpose of handling the local business tributary to its line"[7] but its management soon determined to enhance its financial position by diverting for a "bridge"[8] haul over its line transcontinental Pacific Coast traffic moving over the Union Pacific-Central (now Southern) Pacific route, construction of which had been completed from Council Bluffs, Iowa, through Ogden, Utah, to Oakland, California, in 1869.[9]

Concentrating on its policy of diverting traffic and revenues from other railroads, the Rio Grande's revenues from "bridge" traffic increased over 326 per cent in the 15-year period ending with 1948, while traffic originated and terminated on its line increased only 155 per cent and its local traffic originating and terminating at points on its line was less annually throughout that period than during the period 1924-1929.

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7 *Commercial Club, Salt Lake City v. A.T. & S.F. Ry., supra,* p. 221.

8 The term "bridge traffic" is used to designate traffic hauled by a carrier on whose line the traffic neither originates nor terminates. A "bridge haul" is the transportation of such "bridge" traffic some part of the distance between its point of origin and its final destination. "Bridge" traffic is most attractive because it is generally least expensive to haul since the "bridge" carrier performs none of the expensive branch line, gathering or switching services required at the point of origin and point of final destination. The Rio Grande's President testified that the reason it is pressing for more "bridge" traffic is that "there is more money in it" than in traffic it originates or terminates.

9 Consistent with its determination to act as a "bridge line," the Rio Grande adopted a "policy to favor the facilities and service of their principal arteries at the expense of the remainder of the system" and to abandon or "to divest themselves of all lines not consistent with that general policy . . ." *Denver & R.G.W.R. Co. Trustees Abandonment,* 247 I.C.C. 381, 384. Between 1930 and 1948, it abandoned branch lines consisting of about 17 per cent of its total mileage.

Further pursuing its "bridge" traffic policy, the Rio Grande filed its complaint with the Commission in this case on August 1, 1949. Although the complaint alleged violations of Sections 1 (4), 3, 15 (1) and 15 (3) of the Interstate Commerce Act, the Rio Grande admitted that it filed the complaint for the purpose of improving its financial position by diverting for a "bridge" haul over its line so much as it can of abut 172,000 carloads annually of transcontinental freight traffic now and for some 75 years moved under joint transcontinental rates[10] over through routes which include lines of the Southern Pacific, Great Northern, Union Pacific, Northern Pacific and Milwaukee railroads (designated herein as "Union Pacific routes") between points in the northwestern states of Oregon, Washington, Montana, Idaho and Utah, north of Ogden (designated in this statement as "northwest area"), and points in the eastern and southern parts of the United States, generally east of the Missouri and Mississippi rivers, including points on the Atlantic and the Gulf coasts.[11] These joint rates do not apply via the Rio Grande, except in connection with routes over the Southern Pacific through central California and Nevada

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10 "Transcontinental rates apply between points in the Pacific Coast States, Nevada, Arizona, the northern part of Idaho, western New Mexico, and parts of British Columbia, on the one hand, and points in the United States lying generally east of a line along the eastern borders of Montana and Wyoming, thence through Cheyenne and Denver, Pueblo, and Trinidad, Colo., to El Paso, Tex., on the other hand. In the absence of exceptions or restrictions, the rates generally apply over all routes, *but there are many exceptions.*" (App. B, p. 6, emphasis supplied.)

11 The Commission found that the traffic the Rio Grande seeks to divert to its line in this case ordinarily moves over the Union Pacific through Wyoming and Nebraska to and from Missouri River gateways rather than over the Rio Grande; "because the Union Pacific routes are shorter and, as stated, joint rates are not available over the Rio Grande" for that traffic. (App. B, p. 21)

to Ogden and over the Great Northern to Bieber, Calif., and the Western Pacific to Salt Lake City, on traffic to and from that part of the northwest area lying north of the southern boundary of Oregon and west of the irregular black line shown near the left or west end of the map attached hereto as Appendix A. The joint rates are lower than the combination or sum of the local rates that would have to be charged if the traffic moved via Union Pacific and the Rio Grande. The Rio Grande demanded that its line be included in all of the through routes to and from the northwest area over which the joint rates are applicable, despite the fact it has no trackage and performs no service in that area; that any route via the Rio Grande for movement of the involved traffic would be from 33 to 219 miles longer than the Union Pacific (see figures in oblongs on map, App. A), and would range from 33 percent to more than 50 percent longer than many routes maintained by the Union Pacific with other railroads; that movement of the traffic over the Rio Grande as a "bridge" line would require at least 24 hours more time and one or two more terminal interchanges between carriers, and would short haul the Union Pacific and other railroads 925 miles.[12]

Consistent with the protection afforded by Section 15 (4) of the Act against short hauling, the Union Pa-

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12 As pointed out in footnote "1" of Circuit Judge Johnsen's dissenting opinion:

"1. It should be noted that the situation covered by the Commission's order does not involve the matter of joint rates to intermediate points on the Rio Grande as final destinations. Joint rates already apply to such traffic. The question is one of through routes and joint rates for traffic having a billing origin and destination outside of Rio Grande territory, and for which the Rio Grande therefore would merely be serving as a 'bridge' line only, while the Union Pacific, on whose branch lines most of the traffic originates, would be caused to lose a line-haul thereon of 975 miles." (App. D, p. 22)

cific and other roads serving the northwest area have always insisted, with immaterial exceptions, upon retaining their long hauls on traffic to and from the northwest area.[13]

No complaint has ever been filed by shippers or the public or by any state public service commission demanding the through routes and joint rates sought by the Rio Grande.

After lengthy hearings, a proposed report of its examiner recommending the granting of the Rio Grande's full demands, exceptions to that report, and two oral arguments, the full Commission issued its report and the order herein assailed, January 12, 1953. On June 10, 1953, the Commission denied petitions for reconsideration.

The order requires the Union Pacific and numerous other railroads, whose connecting lines form through routes extending from the Pacific to the Atlantic and Gulf coasts, to establish through routes with the Rio Grande and "the same" joint rates maintained on Union Pacific routes on westbound carloads of granite and marble monuments from Vermont and Georgia to points in the northwest area, and on eastbound carloads of ordinary livestock, fresh fruits and vegetables, dried beans, frozen poultry, frozen foods, butter, and eggs from points in

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13 Union Pacific and some of the other railroad appellants have served the northwest for more than 75 years. Union Pacific now owns and operates 5,606.7 miles of railroad in that area, of which 2,913.19 miles, or over 50 per cent, consist of numerous branch lines extending from and serving as "feeders" to its main lines. About 50 per cent of the traffic the Rio Grande wants routed via its line originates and terminates on these branch lines. The Rio Grande demands, and the effect of the order is that, all these main and branch lines serve as "feeders" of bridge traffic to its line.

the northwest area to points in the eastern and southern parts of the country, indicated above. These articles comprise about 57,000 carloads annually, or a third of the total volume of the traffic the Rio Grande seeks to divert to its line. Diversion of all the traffic permitted by the order would result in estimated revenue loss to the Union Pacific alone of more than $11,000,000 annually, and in very large losses to others of the railroad appellants.

The Commission's Findings and Conclusions

The Commission made the following findings, among others, which are material to consideration of the questions presented. The findings are described here rather fully because of the apparent inconsistency between them and the Commission's ultimate conclusions and its order:

1. That it must overrule a motion of the defendant railroads to dismiss the complaint on the ground that the Commission was estopped by the "financial needs" prohibition of Section 15 (4) of the Act from issuing the order demanded by the Rio Grande. The Commission stated that, in reaching its conclusions, "no consideration has been given to the financial needs" of the Rio Grande (15)[14];

2. That there are at present no through routes, as that term is used in the Act, over the Rio Grande on the traffic here concerned (except on eastbound sheep and goats) and that any order requiring such routes and joint rates over them must be grounded upon findings as specified in Section 15 (4) (b) of the Act, that the routes sought are necessary or desirable in the public interest,

14 Figures in parentheses refer to pages of the Commission's report, as printed in Appendix B hereto.

and "are needed in order to provide adequate, and more efficient or more economic transportation" (14);

3. That the proposed new route via the Rio Grande could not be required "unless the existing (Union Pacific) routes can be found not to provide 'adequate' transportation" (72);

4. That the Union Pacific has surplus transportation capacity, is efficiently operated, furnishes good service to shippers over its line, and its "facilities are adequate to move over its own direct routes the present volume of traffic and any additional volume that may be anticipated in the foreseeable future" (60);

5. A large number of shippers and representatives of communities served by the Union Pacific, traffic, commercial and civic associations, opposed the Rio Grande's complaint. These were from localities in Washington, Oregon, Idaho, Montana, Wyoming, Utah, Colorado, Nebraska, and Kansas. They were joined in their opposition by the public utilities commissions of those States, except Idaho, Utah, and Colorado (65);

6. Shippers in opposition to the Rio Grande's complaint testified to the adequacy, efficiency, and satisfactory character of the service which they had received over the Union Pacific routes. They testified that they had never experienced any difficulty in marketing their products by reason of the lack of competitive joint through rates over the Rio Grande, and would not use that carrier in any event (65);

7. That the Rio Grande route is from 33 to 219 miles longer than the Union Pacific (25), and that routes

via the Rio Grande would be from 33 to 50% longer than many of the present Union Pacific routes (75);

8. That evidence as to physical characteristics of the two lines shows that the Rio Grande is less favorably situated than the line of the Union Pacific; that traffic routed over the Rio Grande, as a "bridge" line would require at least 24 hours more time in transit than when routed over the Union Pacific and would require one or two more terminal interchange services (60), and that operating conditions on the Rio Grande are "more onerous than those on the lines of the Union Pacific or any of the other transcontinental" lines (74);

9. That diversion of the traffic over the Rio Grande would deprive the Union Pacific of its long haul and would short haul it at least 925 miles in each instance (27);

10. That the traffic sought by the Rio Grande moves over Union Pacific routes through Wyoming because those routes are shorter and they offer lower rates than the Rio Grande (21);

11. Concerning public need for the proposed Rio Grande route and damage to Union Pacific routes by diversion of traffic from them to the Rio Grande, the Commission found that it was impossible to determine or estimate accurately what volume of traffic might be diverted to the Rio Grande if all of the joint rates were made applicable over its line (67), but that whatever the volume so diverted would be the result of "active solicitation" by the Rio Grande "to persuade" shippers and receivers to use its line as an overhead or "bridge" route, the value of its service to shippers, and the extent to which the Rio Grande can "induce" shippers to route

traffic via its line for the purpose of using transit facilities at points on its line and subsequent reshipment beyond at the balance of joint through rates from the point of origin (35);

12. That there are substantial dissimilarities or differences between transportation conditions, operating conditions and lengths of hauls over Union Pacific routes and over the Rio Grande but that the differences in transportation conditions become "relatively insignificant" and "substantially similar" when "spread" over the longer hauls between the northwest area and the eastern and southern parts of the country (76);

13. That the evidence failed to prove that the Union Pacific and other lines discriminate against the Rio Grande (except at points on the Bamberger Railroad between Ogden and Salt Lake City) under Section 3 (4) of the Act in refusing to include its line in their through routes and joint rates (77);

14. That (notwithstanding the dissimilarities in transportation conditions over the respective routes) the combination rates via the Rio Grande on the articles named in the order from and to the areas therein described are and for the future will be unjust and unreasonable, and unduly prejudicial of shippers using, or desiring to use, the Rio Grande routes and unduly preferential of shippers and receivers using the Union Pacific routes, to the extent those rates exceed the joint rates maintained on such commodities from and to the same points over the Union Pacific routes (79);

15. That the Rio Grande, a railroad, could not raise in its own behalf an issue of undue prejudice and pref-

erence under Section 3 (1) against another railroad, but that testimony of intervening shippers raised that issue, and also raised a question as to a need for "more" adequate and economic service than afforded by Union Pacific routes with respect to perishable food articles (72);

16. That the present complex and far-flung marketing system for perishable food articles requires that such articles move with expedition and care "over as many routes as possible" with "as much flexibility as possible" and without "unnecessary interruptions" (73), to "as many markets and outlets as possible" (51);

17. That, while through service over Union Pacific routes in general is as satisfactory to shippers as the service which could be provided over routes including the Rio Grande, this is not true with respect to perishable food articles, and that shippers of those articles from the northwest area "are debarred from effective participation in the widespread system developed for the marketing of such commodities" (73), (apparently, only because, if routed over the longer Rio Grande route to eastern and southern markets, higher rates apply than when routed via Union Pacific routes, for the undisputed evidence shows that those shippers market their products via Union Pacific routes in all 48 states and several foreign countries.);

18. That on shipments of perishable food articles reconsigned or accorded transit privileges such as stop-off for partial unloading, storing, or processing in transit, or for feeding or grazing livestock in transit, *at points on the Rio Grande,* "the Union Pacific routes and the joint rates which apply over them are not available, and higher rates apply", and that "on such traffic the

defendants' (Union Pacific) routes are inadequate and less economical than are the Rio Grande routes" (74);

19. That through routes via the Rio Grande and joint rates "the same" as apply over Union Pacific routes for the commodities named in the order between points in the areas described therein are "necessary and desirable in the public interest, in order to provide adequate and more economic transportation" (78);

20. That there is no indication that witnesses admittedly solicited and procured by the Rio Grande to testify so as to help it win its case were improperly influenced or had been stimulated in any questionable manner (38).

Opinions of the District Court

Majority Opinion:

The majority opinion holds that the Commission's order is valid only to the extent that it embraces shipments of the articles named in the order which move to and from the northwest area from and to points east of Denver and which require stoppage-in-transit at points on the Rio Grande not also served by the Union Pacific.[15] To that limited extent the majority holds that the evidence supports the order and that it is valid under Sections 1, 15 (3) and 15 (4) of the Act and does not violate the direction of Section 15 (4) that reasonable preference be

15 The transit privileges described in the majority opinion are feeding and grazing livestock, cleaning, packaging, processing, freezing and storing fresh fruits, vegetables, poultry, food products, butter, eggs and beans, at points on the Rio Grande and later shipped to points east of its eastern termini, and westbound carload shipments of monuments to be stopped for partial unloading at points on the Rio Grande with final destination at points on the Union Pacific northwest of Ogden.

given the carrier which originates the traffic, and that so limited, it would "eliminate" the contention that the order was for the purpose of assisting the Rio Grande to meet its financial needs and would rest squarely within Section 15 (4) (b).

The majority further holds that the order is not valid to the extent that it embraces carload shipments of the articles named in the order which do not require stoppage-in-transit privileges at points on the Rio Grande.

The majority holds that the Commission's finding that Union Pacific routes are inadequate is based on the lack of in-transit privileges at points on the Rio Grande (although the Commission's report (App. B, p. 39) clearly states the fact that all customary transit privileges are available at points on the Rio Grande) and that upon that finding the Commission had power to require through routes and joint rates.

In sustaining the order "in part" the majority adopted a different theory or legal basis from that of the Commission, in that, the majority sustains the order "in part" upon its own finding from the evidence that transportation service *via the Rio Grande* between the northwest area and the area east of Denver is "inadequate and also inefficient and uneconomical" (App. D, p. 18). That is, the majority condemns as inadequate the Rio Grande's own *proposed route* which both the Commission and the majority find necessary to provide adequate and more economic transportation, whereas the Commission held that it could not require the through routes and joint rates demanded by the Rio Grande "unless the existing (Union Pacific) routes can be found not to provide 'adequate' transportation". It found Union Pacific routes

"inadequate and less economical than are the Rio Grande routes" because, on shipments of the articles named in the order reconsigned or stopped for processing, storage or other transit privileges *at points on the Rio Grande*, "the Union Pacific routes and the joint rates that apply over them are not available, and higher rates apply."

The majority holds that the evidence does not support the Commission's finding that present transportation service via Union Pacific routes between the northwest and points east of Denver is inadequate; that the evidence shows that present service over the Union Pacific between such points is adequate and that establishment of "the same" joint rates via the Rio Grande between the northwest and points east of Denver "would not make such service more economical because the rates for such service would only equal the present rates via the Union Pacific between those points" (App. D, p. 18). But the majority also holds that establishment of through routes and equal joint rates on shipments of the articles named in the order that require stoppage-in-transit at points on the Rio Grande (not also served by the Union Pacific) is necessary "to provide adequate and more economic transportation" (App. D, p. 19), and "will result in more economical transportation" (App. D, p. 13).

The majority holds that the Commission is without power to order through routes and joint rates to remove undue preference and prejudice under Section 3 (1) between shippers located on different railroads because, if it did so, the short-hauling prohibition of Sec. 15 (4) "would be practically emasculated" (App. D, p. 16). But the majority also holds that in its requirement of through routes and joint rates in connection with the Rio

Grande at points from Ogden to Salt Lake City, the order "is valid for the purpose of removing an unlawful discrimination against the Rio Grande under Sec. 3 (4) of the Act" (App. D, p. 21). The majority also holds that the order requiring through routes and joint rates which short haul the Union Pacific is valid for the purpose of establishing reasonable joint rates in lieu of the Rio Grande's combination rates found unreasonable by the Commission in violation of Section 1.

Dissenting Opinion:

Circuit Judge Johnsen's dissenting opinion holds that the order should be enjoined and annulled in its entirety because of the "pervading infirmities" on which it rests, and because "The Commission has here used standards and criteria for the exercise of its power to compel through routes and joint rates, which I think are beyond the warrant of the statute" (App. D, p. 22). Pointing out that the Commission purports to make as its primary basis for ordering through routes and joint rates over the Rio Grande, "perishable food articles" and requirements of the marketing system for such articles, including an alleged need for as many transit privileges on as many routes "as possible", and the fact that the Commission has used such new standards and criteria in attempting to justify equalizing rates via the Rio Grande with rates over Union Pacific routes, the dissenting opinion holds—

> "* * * the philosophy and standard of 'as many routes as possible' and 'as much flexibility as possible in the distribution process' can not be made the basis for overriding the short-hauling provisions of section 15(4), through the merry-go-round device of calling all transportation inadequate without the

availability of every bit of transit privilege that exists on any connecting carriers aggregately, and of construing the term 'more economic transportation' to mean nothing more than the difference between joint rates placed in effect and the combination rates previously existing." (App. D, p. 29.)

Observing that where short-hauling other carriers under Section 15 (4) (b) is involved, as it is here, the Commission must find that the proposed additional route will provide "more efficient or more economic transportation" than that provided by present through routes, and further observing that in final analysis what the Commission's order does is simply to reduce the Rio Grande's combination rates to the level of the joint rates over Union Pacific routes, the dissenting opinion holds:

"* * * where the question is one, as here, of opening up, not an initial through route, but an additional one for the same through-traffic to the same ultimate destinations, the Commission's power to establish joint rates cannot be made to constitute the sole ingredient or content of the term 'more economic transportation' under section 15(4), in the addition of another carrier's route as a mere 'bridge' line for such traffic." (App. D, p. 26.)

Circuit Judge Johnsen evaluated the Commission's report and order as a new method by which the Commission attempts "to gain a new foothold, under another disguise" to evade the short-hauling prohibition of Section 15 (4) and he characterizes the Commission's inclusion of marble and granite monuments and ordinary livestock within the "perishable commodities" classification as a further attempt by the Commission "to get the camel's nose under the tent as to one or two other commodities also, in a smothered, beginning approach to an

apparently wider future reach", and holds that to gain a true picture of the order, requires that the Commission's report be "stripped of all the confusion in which the Report has been wrapped".

Pointing to the Commission's findings of more onerous operating conditions and substantially dissimilar and less favorable transportation conditions on the Rio Grande and its conclusion that those dissimilarities become relatively insignificant when spread over hauls of great length, and further pointing to the Commission's finding of discrimination against the Rio Grande without any evidence, but merely upon the lack of evidence concerning either dissimilarity or similarity in transportation conditions along the Bamberger, Circuit Judge Johnsen holds that these instances are "characteristic or in the pattern of the loose and improper basis and manner" in which the Commission has dealt with the entire case and are illustrative of the reasons why the order should be stricken down.

The Questions Presented Are Substantial

The major underlying issue in this case is whether, upon complaint of the Rio Grande, a perenially impecunious short-line railroad seeking to divert additional bridge traffic from other carriers, the Commission may ignore the "financial needs" prohibition of Section 15 (4) of the Act, and use clause (b) of Section 15 (4) to break down admittedly adequate and long-established Union Pacific through routes and channels of commerce and compel them to short haul themselves at least 925 miles to "feed" to the Rio Grande for a "bridge" haul over its longer route traffic which has always moved over the existing Union Pacific routes. The substantiality and public importance of the questions presented is force-

fully indicated by the inevitable fact that, if the interpretations and methods employed by the Commission and the majority of the district court in this case are permitted to stand, then existing through routes and communities served by and dependent on them will no longer have any of the protection under Section 15 (4) against being short hauled which Congress has always refused to yield.[16] That protection is vital to the existence of the essential long-line railroads of the country, and its public importance in this case is demonstrated by the fact that numerous shippers and the public service commissions of Oregon, Washington, Montana, Wyoming and Nebraska, appellants here, intervened and submitted strong testimony to the Commission vigorously opposing the Rio Grande's scheme to enhance its financial position by diverting traffic and revenues to its line from the long-established Union Pacific routes and communities served by them. These five appellant States have continued their opposition to the Rio Grande by intervening as plaintiffs in the district court and joining in the attack

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16 That the Commission in this case has not only departed from but has abused and misused clause (b) of Section 15 (4) clearly appears from the history of legislative action leading to enactment of clause (b). In its report No. 404, April 22, 1937, on Senate Bill 1261, 75th Congress, 1st Session, the Senate Committee on Interstate Commerce said at page 2:

"Your committee feels that the shippers of the country should be given the right to use the *shortest, quickest, and cheapest routes available** * *The bill does not give the Commission power to order the railroads to route shipments in any particular way, but merely provides that *if a shorter route exists*, and if it is in the public interest for the shippers to have this route available, the railroads shall, upon the Commission's order, publish the route and rate in their tariffs. It is not the intention of the committee to interfere with the right of the trunk lines to their long haul, except where this right conflicts with the shippers' right to the *shortest route and lowest rate*. If there is this conflict, the *shipper is merely given the opportunity, if he wishes, of using the shorter or cheaper route.*" (Italics added.)

on the Commission's order, and by their appeal to this Court.[17]

In *U. S. v. Great Northern R. Co.*, 343 U. S. 562, while sustaining the Commission's power to aid a carrier in meeting its "financial needs" by redistributing revenues between carriers forming "an existing through route", where no diversion of traffic from one carrier to another was involved, this Court warned the Commission against the very "form of regulation" its order attempts in this case.[18]

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17 The following statement of the interests and position of those States is made at page 2 of their brief in the district court:

"These states were moved to intervene in the proceeding before the Commission because of the overwhelming detriment the shippers and general public of such states would suffer as a result of the diversion of traffic away from the Union Pacific proposed by the Rio Grande. Any such diversion of traffic would immediately affect the service of the Union Pacific to shippers and would also inflict very serious consequences upon employees of the Union Pacific that are now engaged in the handling of such traffic. Moreover, such diversion, as shown by testimony reviewed hereafter, would greatly impair the capacity of the Union Pacific to continue to provide at lowest cost the transportation service so essential in all this territory.

"It was made indisputably clear by these states that in their area there is no substantial need for the new routes and joint rates proposed by Rio Grande and that the granting of proposed relief to this local mountain railroad of Colorado and Utah would adversely affect the economy of all these intervening states."

18 At pages 574-575, the Court held:

"It is one form of regulation to redistribute revenues between connecting carriers by determining divisions of revenues received on existing through routes. The economic ramifications are quite different if the Commission establishes through routes which divert traffic to the lines of a financially weak carrier. Such action not only serves to assist that carrier financially *but can also, at the same time, cause important changes in the movement of traffic, diverting traffic to a new geographic area at the expense of other carriers and other areas. Congress amended Section 15 (4) to prohibit tinkering with through routes for the purpose of assisting a carrier to meet its financial needs.* But the provisions of Section 15 (4) — the restrictions against short hauling, the financial needs prohibition and the emergency route provision — all deal with the Commission's power to establish through routes." (Italics added.)

And in *Thompson v. United States*, 343 U. S. 549, the Court rejected the Commission's effort to limit by construction the impact of the short-hauling restriction on its power to establish through routes by altering "the form of its order", and attempting to divert traffic to a new route by equalizing rates under an order purportedly issued as an exercise of the power to prescribe reasonable local rates in lieu of rates found unreasonable in violation of Section 1. Those two decisions were handed down by this Court June 2, 1952, about seven months before the Commission issued its report and order January 12, 1953, in this case. Notwithstanding those warnings from this Court, the Commission proceeded in this case to adopt new disguises and devices to completely evade or nullify the protection railroads have under Section 15 (4) against being short hauled by compulsory establishment of additional through routes and joint rates.

The Commission here short hauls the shorter, admittedly adequate, efficient and long-established Union Pacific routes by ordering new through routes and joint rates over the longer and more onerous Rio Grande route, as an indirect remedy for rates via the Rio Grande found unreasonable under Section 1 and unduly prejudicial and discriminatory under Section 3 (1) and (4), and to equalize rates over the longer Rio Grande route with those on the shorter Union Pacific routes. In its efforts to reach its objective, the Commission has not only ignored its direct powers to remedy violations of those sections, but it has also departed from the special Congressional formula or jurisdictional standards and cri-

teria of Section 15 (4) (b)[19] upon which it purports to base its order, and has, by its findings and conclusion dealt with the standards and special formula of that clause as if it read:

> "(b) unless the Commission finds that the through route proposed to be established is *necessary and desirable in the public interest,* in order to provide *more* adequate and more economic transportation."

Thus, by importing "necessary or desirable in the public interest" from Section 15 (3) (which is the standard for ordering new routes that do not short haul exising routes), and substituting that standard for "needed"[20] (which is one ingredient of the formula prescribed by clause "(b)"), and by adding "more", so as to qualify and dilute "adequate", and by deleting "more efficient" from clause "(b)", the Commission has not only departed from the controlling statutory standards and criteria, but has written its own new and different formula to suit its purpose in this case.

In addition to this mutilation of the statutory standards and criteria, the Commission, although finding existing Union Pacific routes to be adequate, efficient, shorter, less onerous and offering lower rates, nevertheless condemns those routes as "inadequate and less economical than are the Rio Grande routes" upon the novel

19 Section 15 (4) prohibits the Commission from ordering a new through route which short hauls existing routes unless (a) the existing route is unreasonably long, or — "(b) unless the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation"

20 *Western Air Lines v. C.A.B.*, 347 U.S. 67, 71; *Delta Air Lines v. Summerfield*, 347 U.S. 74, 79.

ground that "at points on the Rio Grande, the Union Pacific routes and the joint rates which apply over them are not available, and higher rates apply." A similarly unique and untenable reason for condemning and short-hauling an existing route was rejected by this Court in *Interstate Comm. Comm. v. Nor. Pac. Ry.*, 216 U. S. 538.

The result of the Commission's efforts over many years to evade or "limit * * * the impact of the short-hauling restriction on its power to establish through routes"[21] is that in three out of four short-hauling through route cases reviewed by this Court, the Commission's orders have been stricken down because they violated or ignored the short haul prohibition. See *Interstate Comm. Comm. v. Nor. Pac. Ry.*, 216 U. S. 538 (1910); *United States v. Mo. Pac. R. Co.*, 278 U. S. 269 (1929); and *Thompson v. United States*, 343 U. S. 549 (1952). The only short-hauling order of the Commission which this Court has sustained was in *Pennsylvania R. Co. v. U. S.*, 323 U. S. 588 (1945).[22]

The necessity for briefs, oral argument and a decision by this Court settling the contrariety of views and the legality or illegality of the novel interpretations and

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21 *Thompson v. United States*, 343 U.S. 549, 555-556, and footnotes.

22 But the through routes required in that case eliminated four extra days' time in transit, a 149-mile out-of-line haul costing 90 cents per ton and two switching interchanges, in contrast with a completely reverse set of facts in the instant case, where the longer Rio Grande route required by the Commission's order would result in some 200 miles of additional transportation over the most "onerous" operating conditions of any western railroad, adding $124 per car to transportation cost, two additional interchanges between carriers at an additional cost of $20.44 per car per interchange, and at least one or two days' more time in transit, and would short haul existing routes at least 925 miles, and would deprive some of the appellant railroads of their entire hauls.

methods by which the Commission and the majority of the district court reached the results here presented is further indicated by the facts that—

(1) Of the eleven Commissioners, three dissented "in part", one dissented, in effect, by "concurring in part" and one did not vote upon the issuance of the Commission's order in this case;

(2) The majority of the district court found it necessary to "remake" the Commission's order but, even by doing so, was able to sustain it only "in part" by adopting a different legal basis for it and by limiting it to shipments of the articles named in the order that would actually stop for transit privileges at points on the Rio Grande. The dissenting opinion of Circuit Judge Johnsen, however, exhibits views widely divergent from those of the majority and would strike down the order in its entirety because of the "pervading infirmities" on which it rests and because the Commission used "standards and criteria" which are beyond the warrant of the statute, and dealt with the entire case in a "loose and improper" manner so as "to get the camel's nose under the tent as to one or two other commodities also, in a smothered, beginning approach to an apparently wider future reach", all in "another attempt by the Commission to gain a new foothold, under another disguise, for the philosophy and position that it should have the right to put into effect as many new through routes as it deems advisable, without being required to give consideration to the question of short hauling another carrier";

(3) Five separate appeals, involving both facets of the final decree sustaining the order "in part" and

enjoining it "in part," have been taken to this Court by adverse parties to this suit from the judgment below;

(4) The Rio Grande itself brought a suit in the District Court for the District of Colorado, *The Denver and Rio Grande Western Railroad Company v. United States of America and Interstate Commerce Commission*, Civil Action No. 4492, in which it sought to enjoin and annul the Commission's failure and refusal in this same proceeding to grant its full demands for through routes and joint rates on all commodities. On February 14, 1955, that Court entered a final judgment and decree, upon its opinion filed January 13, 1955, enjoining and setting aside the Commission's order "insofar as it denied and withheld relief" to the Rio Grande. A motion for new trial, reargument and reconsideration was overruled and denied by order of that court entered April 22, 1955. That case will also be appealed to this Court.

The questions presented by this appeal are new and different from questions presented on different factual situations in other through route cases reviewed by this Court. The questions here presented have not been considered by this Court. If the new methods and criteria by which the Commission and the majority of the court below reached the ends the Commission attempts to accomplish in this case are allowed to stand, then, as pointed out in the dissenting opinion of Circuit Judge Johnsen—

> "* * * the railroads of the country may as well forget section 15(4) entirely, as affording them any protection whatsoever against deprivation of their long hauls." (App. D, p. 27.)

It is submitted that the questions presented by this appeal are substantial and of general public importance not only to the appellant railroads and the five appellant States but also to the more essential railroads comprising long-established routes and channels of commerce and trade, and to shippers and communities served by them throughout the country.

Respectfully submitted,

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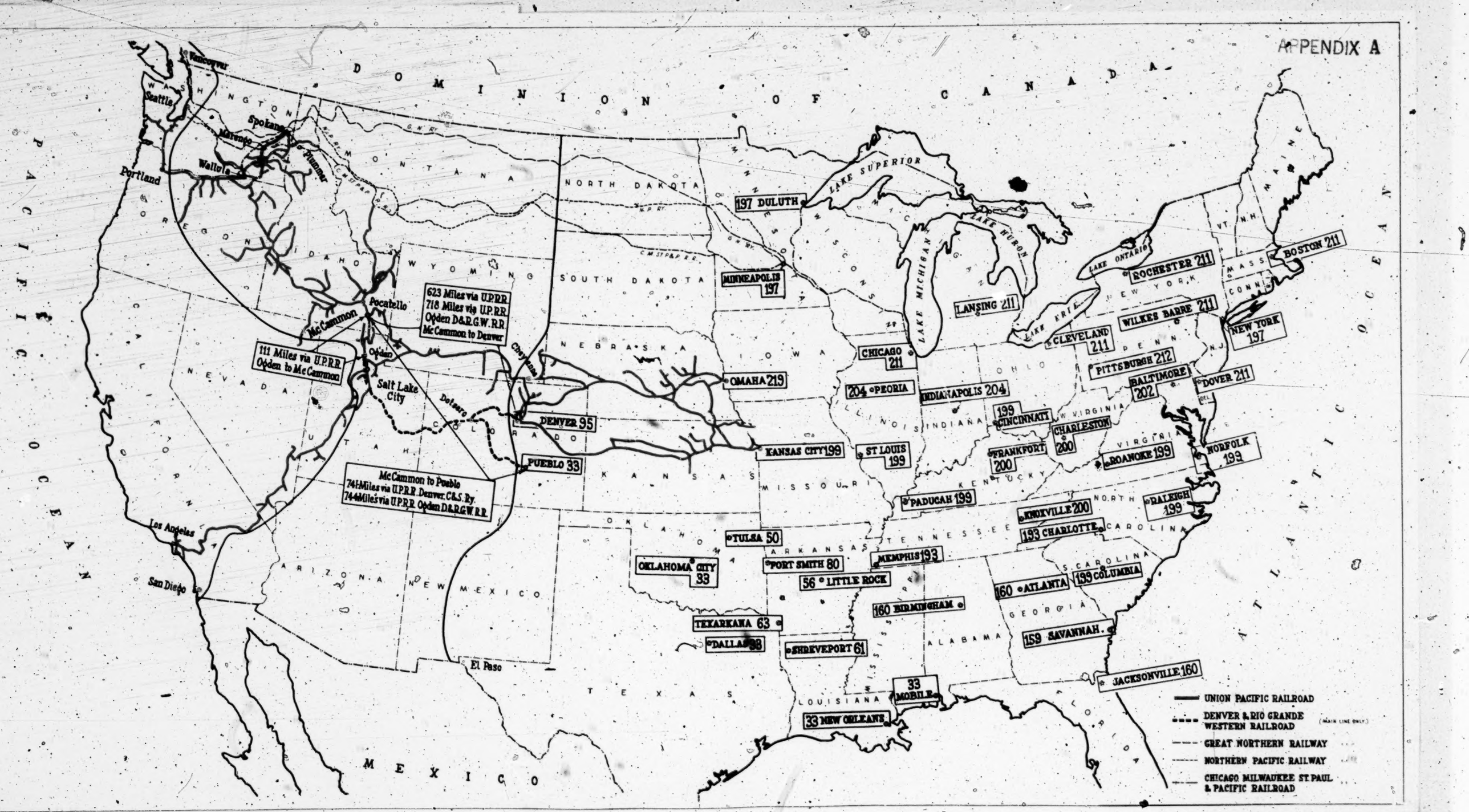
APPENDIX A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MEXICO
Vancouver
Seattle
Portland
Spokane
Marengo
Wallula
Plummer
WASHINGTON
OREGON
IDAHO
MONTANA
WYOMING
NORTH DAKOTA
SOUTH DAKOTA
NEBRASKA
NEVADA
UTAH
COLORADO
KANSAS
ARIZONA
NEW MEXICO
TEXAS
OKLAHOMA
MISSOURI
ARKANSAS
LOUISIANA
MINNESOTA
IOWA
ILLINOIS
WISCONSIN
MICHIGAN
OHIO
INDIANA
KENTUCKY
TENNESSEE
MISSISSIPPI
ALABAMA
GEORGIA
FLORIDA
SOUTH CAROLINA
NORTH CAROLINA
VIRGINIA
W. VIRGINIA
PENN.
NEW YORK
MASS.
VT.
N.H.
MAINE
CONN.
N.J.
DEL.
MD.
LAKE SUPERIOR
LAKE MICHIGAN
LAKE HURON
LAKE ERIE
LAKE ONTARIO
Los Angeles
San Diego
El Paso
Pocatello
McCammon
Ogden
Salt Lake City
Cheyenne
Denver
Pueblo
Delores
623 Miles via U.P.R.R.
718 Miles via U.P.R.R.
Ogden D&R.G.W.R.R.
McCammon to Denver
111 Miles via U.P.R.R.
Ogden to McCammon
McCammon to Pueblo
741 Miles via U.P.R.R. Denver C&S. Ry.
744 Miles via U.P.R.R. Ogden D&R.G.W.R.R.
197 DULUTH
MINNEAPOLIS 197
OMAHA 219
DENVER 95
PUEBLO 33
KANSAS CITY 199
ST LOUIS 199
CHICAGO 211
204 PEORIA
LANSING 211
INDIANAPOLIS 204
199 CINCINNATI
CLEVELAND 211
ROCHESTER 211
BOSTON 211
WILKES BARRE 211
NEW YORK 197
PITTSBURGH 212
BALTIMORE 202
DOVER 211
CHARLESTON 200
FRANKFORT 200
ROANOKE 199
NORFOLK 199
RALEIGH 199
KNOXVILLE 200
193 CHARLOTTE
PADUCAH 199
MEMPHIS 193
PORT SMITH 80
56 LITTLE ROCK
TULSA 50
OKLAHOMA CITY 33
TEXARKANA 63
DALLAS 98
SHREVEPORT 61
160 BIRMINGHAM
160 ATLANTA
159 SAVANNAH
199 COLUMBIA
JACKSONVILLE 160
33 MOBILE
33 NEW ORLEANS
UNION PACIFIC RAILROAD
DENVER & RIO GRANDE WESTERN RAILROAD (MAIN LINE ONLY)
GREAT NORTHERN RAILWAY
NORTHERN PACIFIC RAILWAY
CHICAGO MILWAUKEE ST PAUL & PACIFIC RAILROAD

INTERSTATE COMMERCE COMMISSION

No. 30297

DENVER & RIO GRANDE WESTERN RAILWAY COMPANY v. UNION PACIFIC RAILROAD COMPANY, ET. AL.

Submitted October 16, 1952. Decided January 12, 1953

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1. Through routes and joint rates found necessary and desirable in the public interest via Ogden or Salt Lake City, Utah, in connection with complainant, on certain commodities from and to points in the excluded territory in the northwest area as described in the report, to and from points in official, southern, and southwestern territories, including Missouri and a portion of Iowa.

2. Rates on the same commodities from and to the same points over complainant's routes via Ogden or Salt Lake City, found unreasonable and unduly prejudicial to and preferential of shippers and receivers.

3. Maintenance by defendants of joint rates between points in the northwest area, on the one hand, and points on the Bamberger Railroad south of Ogden, on the other hand, while refusing to participate in like rates to and from the same points on the line of complainant south of Ogden, found to subject complainant to unlawful discrimination.

4. Order entered requiring removal of unlawfulness found to exist and establishment of through routes and joint rates found reasonable.

Robert E. Quirk, Otis J. Gibson, and *H. L. Mulliner* for complainant.

Elmer B. Collins, L. H. Anderson, John B. Burchell, Robert H. Bierma, L. E. Clarahan, F. H. Cole, Jr., Eugene S. Davis, Lee S. Davis, P. H. Draver, F. G. Fitzpatrick, P. F. Gault, R. J. Hagman, L. W. Hobbs, Roland J. Lehman, B. P. Leverich, James E. Lyons, E. F. McGuire, F. J. Melia, Conrad Olson, W. R. Rouse, James S. Souby, Jr., Carson L. Taylor, and *L. E. Torinus, Jr.,* for defendants.

C. A. Miller for a railroad association; *Chas. B. Bowling, Carl R. Bullock, Henry A. Cockrum,* and *J. L. Pease* for Secretary of Agriculture; *Ralph C. Horton, John H. Winchell, Joseph W. Hawley, T. S. Wood,* and *Ralph Sargent, Jr.,* for Public Utilities Commission of the State of Colorado; *W. B. Joy, H. N. Beamer, B. Auger* and *L. F. Purvis* for Public Utilities Commission of Idaho; *Byron M. Gray* for State Corporation Commission of the State of Kansas; *Edwin S. Booth* and *Sidney T. Smith* for Board of Railroad Commissioners of the State of Montana; *Clarence S. Beck, Harold A. Palmer, Bert L. Overcash,* and *Harry C. King* for State of Nebraska and Nebraska State Railway Commission; *John H. Carkin* and *Thomas W. Dench* for Public Utilities Commissioner of Oregon; *Smith Troy, Phil H. Gallagher, Joseph Starin,* and *Bartlett Burns* for Washington Public Service Commission; *Norman B. Gray* and *Jefferson C. Church* for the State Board of Equalization and Public Service Commission of Wyoming; *Hal S. Bennett, Donald Hacking, W. R. McEntire,* and *Chas. A. Root* for Public Service Commission of Utah; and *George F. Guy* for the city of Cheyenne, Wyo., interveners.

Calvin L. Blaine, Chas. E. Blaine, Maurice H. Greene, Alden T. Hill, E. K. Kohlwes, Lowe P. Siddons, Reginald T. Titus, and *Lee J. Quasey* for other interveners.

Report of the Commission

BY THE COMMISSION:

Exceptions to the report proposed by the examiner were filed by the complainants, the defendants, and cer-

tain interveners and the issues were twice argued orally. Our conclusions differ in part from those recommended. Exceptions and requested findings not discussed in this report nor reflected in our findings or conclusions have been given consideration and found not justified.

The complainant, sometimes called the Rio Grande, a common carrier by railroad operating in interstate commerce within the States of Colorado, Utah, and New Mexico, requests us to order the Union Pacific Railroad Company, which with its leased lines is referred to as the Union Pacific system or the Union Pacific, and the other defendants to establish and maintain for the future just, reasonable, and non-discriminatory competitive joint through rates[1] and charges for the transportation of freight in connection with the complainant through Salt Lake City or Ogden, Utah, referred to as the Ogden gateway. More particularly, we are asked to require the defendants to establish such joint rates on freight traffic in connection with the complainant through its Colorado and Utah gateways, (1) between (*a*) points on the Union Pacific or its connections in Utah north of Ogden and in Idaho, Montana, Oregon, Washington,[2] and British Columbia, Canada, and (*b*) Colorado common points and the northwest territory specified in 1 (*a*).

No evidence was submitted with respect to rates from or to British Columbia, and such rates will not be considered.

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1 Rates and rate differences named herein are per 100 pounds and are those in effect at the time of the hearing herein.

2 This area is referred to in this report as the northwest area or territory.

Interveners in support of the complaint include the Secretary of Agriculture of the United States, the public utility commissions of the States of Colorado and Utah, the American National Live Stock Association, other livestock and stock-feeder associations, various shippers' and producers' associations, milling companies, farm bureaus, chambers of commerce, and certain groups of employees of the complainant.

Interveners in support of the defendants include the State of Nebraska, city of Cheyenne, Wyo., the public utility commissions of the States of Montana, Washington, Oregon, Wyoming, Nebraska and Kansas, various chambers of commerce and other associations, certain employee groups in Wyoming, and employee groups of the Union Pacific, the Chicago and North Western Railway Company, and the Wabash Railroad Company.

In its exceptions to the proposed report, the State Corporation Commission of the State of Kansas took the position that the recommended finding that joint rates should be established over the existing through routes by way of Ogden and the Rio Grande is amply sustained by the evidence with respect to the rates on wheat and livestock but not otherwise, and that the recommended findings as to commodities generally are too broad in scope.

The Public Utility Commission of the State of Idaho intervened but presented no evidence. It filed a brief in which it took the position that the relief sought by the complainant should be denied, except that joint through competitive rates should be required to be established via Ogden and the Rio Grande on livestock and fruits and vegetables.

We granted a petition for leave to intervene filed by the American Short Line Railroad Association. That association appeared in support of the complaint and was represented at the hearing and the oral argument, but offered no evidence. The defendants filed a petition for reconsideration of the order permitting intervention. The request was denied at the hearing, but it is renewed on brief. It appears that 44 of the defendants named in the complaint are members of the association and that 8 defendant members are subsidiaries under common control and management with other defendants. Additional facts were developed at the hearing with respect to the relation of certain members of the association as defendants and indicating that they, as well as some others, opposed the complaint. The association filed a brief from which it appears that it has a current membership of 314 common carriers by railroad and that the association as such and many of its members are interested in the issues presented in the complaint. The intervention sought and granted was by the association as such, and not by or in behalf of the respective members thereof named herein as defendants. The petition of intervention was properly granted, and the petition for reconsideration is denied.

Immediately prior to the oral argument, counsel for the defendants submitted a memorandum of additional authorities and discussion relating to certain exceptions filed by the Union Pacific to the proposed report of the examiner. The complainant and certain interveners objected to the receipt of the document. Our rules of practice do not permit the submission of such a document so late in the proceeding. Permission to file it was not requested in time to permit opposing parties to examine it and to make reply thereto prior to the oral argument when

the proceeding was finally submitted. The objection to its receipt in the proceeding is sustained.

The complainant alleges that the defendant's failure and refusal to join with it in establishing joint rates to and from the territories described on transcontinental and other traffic through the gateways referred to result in violations of sections 1 (4) and 3 of the Interstate Commerce Act, and is contrary to the national transportation policy as declared by the Congress. We are asked to prescribe just and reasonable rates over the Rio Grande routes to remove the alleged unlawfulness.

Transcontinental rates apply between points in the Pacific Coast States, Nevada, Arizona, the northern part of Idaho, western New Mexico, and parts of British Columbia, on the one hand, and points in the United States lying generally east of a line along the eastern borders of Montana and Wyoming, thence through Cheyenne and Denver, Pueblo, and Trinidad, Colo., to El Paso, Tex., on the other hand. In the absence of exceptions or restrictions, the rates generally apply over all routes, but there are many exceptions. The principal ones of importance in this proceeding are those under which the Union Pacific for the most part restricts routing on traffic to and from points in Utah north of Ogden and in Idaho, Montana, Oregon, and Washington over its lines so that it may obtain the long haul from and to the Missouri River. On transcontinental traffic that moves over its lines to and from California, Nevada, and portions of Utah, the Union Pacific participates in through routes and joint rates with other lines, including the Rio Grande. On that traffic interchange is made with the Rio Grande at Salt Lake City and Provo, Utah.

As hereinafter explained, the Rio Grande participates in joint rates on transcontinental traffic with all of its connections at its Utah junctions, except the Union Pacific, from and to the western portions of the northwest area. Routes are available to and from points in the northwest area over the Union Pacific from and to Ogden and the Rio Grande and its eastern connections beyond, but generally shippers must pay combination rates when using such routes. The maintenance of those rates produces higher charges than those resulting from the joint rates maintained by the defendants over other routes. The higher rates and charges act as deterrents to shippers and, in effect, close the Ogden gateway in a commercial sense. We are asked to exercise our authority under section 15 (3) of the act by requiring the establishment of joint rates through that gateway upon findings that such rates are necessary or desirable in the public interest.

The power to establish through routes and joint rates is limited by the provisions of section 15 (4), which declares that, except as provided in section 3 of the act, and except where one of the carriers is a water line, we may not require a railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, (*a*) unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established, or (*b*) unless we find that the through route proposed is needed in order to provide "adequate, and more efficient or more economic, transportation." The foregoing provisions are subject to the further proviso that in prescribing through routes,

we shall, so far as is consistent with the public interest, and subject to the foregoing limitations in clauses (*a*) and (*b*), give reasonable preference to the carrier by railroad which originates the traffic. The section further provides that no through route and joint rates applicable thereto shall be established by us for the purpose of assisting any carrier that would participate therein to meet its financial needs.

The complainant contends that because the routes over which joint rates are sought are in existence and open to traffic at combination rates, we are not called upon to require the establishment of through routes and, therefore, the limitations on our power to do so in section 15 (4) are not applicable and need not be considered. It further contends that the principal task here is to determine whether the through rates resulting from the combination or aggregate of intermediate rates over such through routes are unjust, unreasonable, or discriminatory, in violation of sections 1 and 3 of the act, and contrary to the national transportation policy. The complainant argues that there is public need for joint rates via the Ogden gateway equal to the joint rates now maintained by the defendants over the competitive routes, and the public interest as well as the national transportation policy will be served by the establishment of such rates.

Through Routes

The first question for our determination, therefore, is whether or not the present routes by way of the Ogden gateway constitute "through routes" as that term is used in section 15 (3) and (4) of the act. As above stated and as testified by numerous shippers in this proceeding, the Ogden gateway routes are not considered as open or

through routes commercially, but as routes that are closed to shippers because of the higher rates applicable. Plainly, a finding that such routes should be opened to shippers on a commercial basis by establishing competitive joint rates would result in the establishment of such routes as effective through routes, a character which they do not now possess.

In *Thompson v. United States*, 343 U. S. 549, decided June 2, 1952, the Supreme Court considered the question of the content of the term "through route" as used in the act, upon an appeal from a decision of a lower court sustaining our order in *Omaha Grain Exc. of Omaha, Nebr. v. Missouri Pac. R. Co.*, 278 I. C. C. 519. Therein, we had affirmed a prior finding of division 2 that a through route on grain from points on the Central branch of the Missouri Pacific Railroad Company in Kansas, Concordia and west thereof (Lenora, Kans., was used as a typical origin), to Omaha, Nebr., and Council Bluffs, Iowa, in connection with the line of the Chicago, Burlington & Quincy Railroad Company beyond Concordia, was already in existence and therefore did not have to be established preliminary to the exercise of our power to prescribe reasonable rates under sections 1 and 15 (1) of the act. The Court held:

> In short, the test of the existence of a "through route" is whether the participating carriers hold themselves out as offering through transportation service. Through carriage implies the existence of a through route whatever the form of the rates charged for the through service.
>
> In this case there is no evidence that any through transportation service has ever been offered from Lenora to Omaha via the Burlington. The carriers' course of business negatives the existence of any such

through route. * * * Through service to points short of Omaha cannot be used as evidence of the existence of a through route to Omaha * * *. Since there is admittedly no evidence that the Missouri Pacific ever offered through transportation service over the route in question, the Commission's order is without evidentiary support under the accepted tests for determining the existence of a through route.

The Court cited with approval *Beaman Elevator Co. v. Chicago & N. W. Ry. Co.*, 155 I. C. C. 313, wherein the Commission held that proof of one shipment on a through bill of lading over a particular route was not sufficient to show the existence of a through route, because, as stated by the Court, "that one shipment was not representative of the carriers' course of business." It thus becomes necessary to determine whether the carriers in this proceeding "hold themselves out as offering through transportation service" from and to the points here concerned via the Ogden gateway as indicated by their "course of business" in respect of traffic over the routes in question.

The evidence shows that 37 carload shipments were made in 1948, which may be accepted as a representative year, on through bills of lading from origins in Utah, Idaho, Oregon, and Washington to destinations on the Rio Grande in Utah and Colorado via Ogden or Salt Lake City. All of these shipments originated on the Union Pacific, except three which originated on its connections in Oregon or Washington. Twenty-three moved to Salt Lake City (via Ogden), Provo, Midvale, Murray, and Springville, Utah, and 14 to Denver, Louviers, Pueblo, and Trinidad, Colo., on the complainant's line from Denver to Trinidad. The commodities shipped were canned goods, canned salmon, machinery, contractors' equipment,

paper bags, lumber, wallboard, flour, roofing, acid, newsprint, and sheep. The shipments of canned goods and canned salmon, 10 in number, were stopped at intermediate points on the Rio Grande for partial unloading. The 37 shipments moved from or to separate points, except that 2 carloads of canned salmon moved from Seattle, Wash., to Provo, 2 carloads of acid from Dupont, Wash., to Louviers, 2 carloads of canned goods from Logan, Utah, to Denver, 2 carloads of sheep from Bellevue, Idaho, to Pueblo, 3 carloads of lumber from McCall, Idaho, to Salt Lake City, 3 carloads of canned goods from Logan to Pueblo, and 6 carloads of lumber from Emmett, Idaho, to Midvale. No through shipments are shown to have moved from the northwest area over the Union Pacific and the Rio Grande via Ogden or Salt Lake City to any destination east of Colorado common points.

West-bound, in the same year, 18 carload shipments were made on through bills of lading from points in Illinois, Indiana, Michigan, Ohio, Pennsylvania, New Jersey, Arkansas, and Texas over connecting lines and the Rio Grande to Salt Lake City or Ogden and the Union Pacific beyond to destinations in Utah, Idaho, Montana, Oregon, and Washington. These shipments consisted of tractors, dessert preparations, furniture, canned goods, agricultural implements, soap, cattle, castings, feed, rubber, cottonseed hull bran, and tile. The shipments of tractors, dessert preparations, furniture, canned goods, agricultural implements, and feed were stopped at intermediate points on the Rio Grande or the Union Pacific, or both, for partial unloading. Two of the shipments destined to Idaho points were delivered at Salt Lake City and trucked to destinations so as to avoid paying the applicable combination rates on Ogden.

In that same year, 21 carload shipments moving on through bills of lading from various origins east of the Rocky Mountains to destinations in Idaho, Oregon, and Washington, which were routed over the Rio Grande and the Union Pacific, were held by the Rio Grande at Denver or Pueblo for correction of the routing because the joint through rates were not applicable over that road via the Ogden gateway. Under service orders issued by us during and subsequent to World War II, a substantial number of shipments were diverted from the regularly used routes to the routes here sought to be opened commercially. For example, in February, 1949, when the main line of the Union Pacific in Wyoming was blocked by snow storms, the traffic was diverted to the route of the Rio Grande between Denver and junctions with the Union Pacific in Utah. During World War II, special combination trains of troops in passenger cars and of military supplies in freight cars from eastern and southern origins to destinations in the northwest area were initially routed and moved over the Rio Grande via Ogden and the Union Pacific. The rates and charges for these freight movements were not filed with us and were adjusted, under the authority of section 22 of the act, on the basis of the joint rates applicable over the Union Pacific routes through Wyoming. These movements, as well as those under service orders, were made under emergency conditions and not in the ordinary course of the carriers' business. They show only that the Rio Grande routes were physically practicable and have no bearing upon the issue of whether or not those routes constitute "through routes" within the meaning of that term as used in the act.

So far as appears, the routes used, or attempted to be used, for the foregoing shipments were those specified by

the shippers. There is no indication that any of the defendants has ever solicited any traffic from and to the areas here concerned for routing over a Rio Grande route by which a higher combination rate applied, or has ever used such a Rio Grande route except where called upon to do so by routing specified by the shipper or by a prior connecting carrier. In other words, so far as this record shows, "the carriers' course of business" has been and is to use the Union Pacific routes except where called upon to use the Rio Grande routes by force of shippers' or connecting carriers' routing. The whole course of conduct of the Union Pacific, so far as revealed, has been for many years and is now to guard jealously its long haul and not open commercially the Rio Grande routes on this traffic. That this policy has been maintained is amply demonstrated by the fact that in a representative year, as stated, only 37 carloads eastbound, none to destinations east of Colorado common points, and 18 carloads west-bound moved over Rio Grande routes via Ogden or Salt Lake City, as compared with many thousands in both directions in the same year from and to the same points at the joint rates over the Union Pacific routes, the details of which appear later in this report.

Thus, all of the foregoing shipments made over the Rio Grande routes must be regarded as of an isolated nature and as falling in the same category as the shipment held insufficient to show the existence of a through route in *Beaman Elevator Co. v. Chicago & N. W. Ry. Co., supra,* cited with approval by the Supreme Court in *Thompson v. United States, supra.* Any other holding would constitute an open invitation to any shipper to set aside the provisions of section 15 (3) and (4) of the act simply by preliminarily making a shipment or two over

the route sought to be opened commercially, a result plainly not intended by the Congress, as evidenced by the amendments to section 15 (4) made in 1940 (see *D. A. Stickell & Sons, Inc., v. Alton R. Co.*, 255 I. C. C. 333, 339), and a result clearly not in accord with the decision in *Thompson v. United States, supra.*

We find that there are at present no through routes, as that term is used in the act, over the Rio Grande via Ogden or Salt Lake City on the traffic[3] here concerned, and that any order requiring the establishment of such routes and joint rates over them, must be grounded upon findings, as specified in section 15, that the routes sought are necessary or desirable in the public interest, and are needed in order to provide adequate, and more efficient or more economic transportation.

The paramount issue in this proceeding, therefore, is whether the Ogden gateway should be made available to shippers for routing, at joint rates equal to those over competitive routes, of all traffic in connection with the Rio Grande between the areas involved. For the foregoing reasons, that issue falls within the limitations of section 15 (3) and (4). In addition, evidence was presented bearing upon the issues of the reasonableness of the assailed rates charged on that traffic, discrimination between connecting lines resulting from the refusal of the defendants to join in establishing joint rates lower that the assailed rates, and undue prejudice against shippers using or desiring to use the Ogden-gateway routes. These issues are closely related and will be considered together.

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3 Except on east-bound shipments of sheep and goats, to which reference is made later in this report.

Before proceeding to a discussion of the evidence relating to the foregoing issues, we shall give consideration to a procedural contention and a motion made by the defendants. The contention is that an allegation of undue prejudice and preference under section 3 (1) of the act is not properly before us. As stated, the complaint embodies an allegation, among other things, of violation of section 3, without specifying any particular paragraph or paragraphs of that section. We agree that complainant, a railroad, could not raise, in its own behalf, an issue under section 3 (1) against another railroad. Intervening shippers, however, have raised such an issue. Testimony, pro and con, was received on this issue and we think it has been fairly tendered here for decision.

The motion is that the complaint be dismissed on the ground that the request of the complainant for joint rates over the Rio Grande via the Ogden gateway is for the purpose of assisting that carrier to meet its financial needs. As stated, section 15 (4) of the act forbids us to require the establishment of any through route and joint rate applicable thereto for the purpose of assisting any carrier that would participate therein to meet its financial needs. Consistently throughout the proceeding, the complainant disclaimed any intent to prosecute the complaint with the object of assisting it in meeting its financial needs. The prohibition referred to is directed to us; not to any complaining carrier. In reaching our conclusions herein, no consideration has been given to the financial needs of the complainant. The motion is overruled.

Proponents' Testimony

Joint rates now apply via the Ogden gateway over the Rio Grande on traffic from and to Colorado common

points and points east thereof to and from California and certain Pacific coast points in connection with the Union Pacific, the Southern Pacific Company, The Western Pacific Railroad Company, and The Great Northern Railway Company, as more particularly described later.

The Union Pacific with its leased lines has operated since January, 1936, as a single system. It consists of the Union Pacific Railroad Company operating from Omaha, Nebr., and Kansas City, Mo., to Ogden via Julesburg, Colo., Cheyenne and Granger, Wyo., and via Limon and Denver, Colo., and Cheyenne; the Oregon Short Line Railroad Company operating in Utah north of Ogden, and in Wyoming, Idaho, Oregon, Montana, and Nevada, extending from Salt Lake City to Butte, Mont., and Huntington, Oreg., the Oregon-Washington Railroad and Navigation Company operating in Idaho, Oregon, and Washington north and west of Huntington to Spokane, Wash., Portland, Oreg., and Seattle, Wash.; the Los Angeles & Salt Lake Railroad Company from Salt Lake City to Los Angeles, Calif.; and the St. Joseph & Grand Island Railroad Company in Kansas, Nebraska, and Missouri from St. Joseph, Mo., and Grand Island, Nebr. Lease of the properties of the foregoing roads, which had been operated with the Union Pacific under common control and management, was considered and approved in *Union Pac. R. Co. Unification*, 189 I. C. C. 357 (1933) and 207 I. C. C. 543 (1935).

The railroad now operated by the complainant was originally the Denver, Rio Grande Railway organized in 1870 as a narrow-gage line. After passing through various hands and receiverships, the Denver and Rio Grande Railroad Company was organized in 1886 to operate the property. When the main line was converted to standard

gage in 1890, the railroad was opened for through traffic between Denver and Ogden by way of Pueblo, Rio Grande, and Tennessee Pass, Colo. Prior to that date, the Rio Grande could participate in transcontinental traffic only by transferring the lading to its narrow-gage cars. In 1901, it acquired the Rio Grande Western Railroad Company operating between Grand Junction, Colo., and Ogden via Provo and Salt Lake City.

Although opened for through business, the line was handicapped by the fact, among others, that traffic originated at or destined to its Colorado gateways or east thereof could not be interchanged at joint through rates at Ogden or Salt Lake City with its connections, the Oregon Short Line, to or from points on that line in Utah north of Ogden and through southern Idaho to Butte and Huntington. Also, traffic from and to Oregon over the Southern Pacific, to or from Colorado common points and east, could not be transported over the Rio Grande at joint rates equal to those over competitive routes. In 1897, however, the Union Pacific and its controlled lines, the Oregon Short Line and the Oregon-Washington Railroad and Navigation Company operating north and west of Huntington, were in separate receiverships. In that year the two lines last named established joint through rates to and from points in the northwest area with the Rio Grande via Ogden and thus opened that gateway at rates equal to the rates then in effect over the Wyoming line of the Union Pacific through Cheyenne and Granger. Those rates applied on traffic between the Pacific coast terminals, including Portland, Tacoma, and Seattle, and Missouri and Mississippi River points and numerous points east thereof.

In the same year, the Oregon-Washington Railroad and Navigation Company established joint through rates

between its Oregon and Washington stations and points on, or reached by, the lines of the Great Northern and Northern Pacific Railway Company through Spokane and Wallula, Wash. Joint rates through those junctions from and to Union Pacific stations have been continued in effect.

Ogden remained as an open gateway through which joint rates over the Rio Grande applied until 1906, when such rates were canceled by the Union Pacific from and to Colorado common points and east, to and from points in Montana, Idaho, and Oregon on the Oregon Short Line and its connections. In 1912, transcontinental freight rates to and from points on the Oregon-Washington Railroad and Navigation Company (resulting from reorganizations in the interval) over the Rio Grande and its Utah junctions were also canceled. During this period the Southern Pacific was controlled by the Union Pacific and that circumstance greatly influenced the routing of freight and passenger traffic over the Union Pacific to and from Oregon and California. As a result of competitive stresses, as well as for other reasons, the Rio Grande financed the construction of a new railroad, the Western Pacific, to obtain an outlet to the Pacific coast. The Western Pacific was opened in July 1911 and participates in through routes and joint rates on transcontinental traffic via Salt Lake City with the Rio Grande and the Union Pacific, its two connections at that point. In 1912, the Union Pacific was required to divest itself of control of the Southern Pacific. *United States v. Union Pac. R. Co.*, 226 U. S. 61.

Through passenger fares also were in effect over the lines of the Union Pacific and the Rio Grande via the latter's Colorado and Utah junctions from 1897 to 1915,

when they were canceled by the Union Pacific. *Ogden Gateway Case*, 35 I. C. C. 131.

In 1915, the Western Pacific and, in 1918, the Rio Grande, went into receivership. After various changes, the latter was reorganized on April 11, 1947, as the Denver and Rio Grande Western Railroad Company. *Denver & R. G. W. R. Co. Reorganization*, 267 I. C. C. 862. As a part of its reorganization on that date, the Rio Grande merged with the Denver and Salt Lake Railway Company, and thereby acquired the Moffat tunnel line of that carrier. By that line and the Dotsero cut-off, completed in 1934, from Orestod, Colo., on the Denver & Salt Lake to Dotsero, Colo., on its own line, the Rio Grande obtained a route from Denver to Ogden 175 miles shorter than its route through Pueblo.

The Rio Grande now operates between Denver and Ogden over the two routes. By way of the Moffat tunnel the distance is 607 miles, and the other route through Pueblo is 782 miles. These two are the main lines and constitute 951 miles, or 51 percent, of the Rio Grande standard-gage tracks. In addition, there are 1,452 miles of branch lines, of which 527 miles are narrow gage serving western Colorado and northwestern New Mexico in areas of small population and light traffic. In all, it operates about 2,400 miles of road.

Eastern connections of the Rio Grande are in Colorado at Denver, Colorado Springs, Pueblo, Walsenburg, and Trinidad. At Denver, it connects and interchanges traffic with the Union Pacific, the Chicago, Burlington & Quincy Railroad Company, called the Burlington, the Chicago, Rock Island and Pacific Railroad Company, called the Rock Island, The Atchison, Topeka and Santa

Fe Railway Company, called the Santa Fe, and The Colorado and Southern Railway Company, of the Burlington system. At Colorado Springs, 75 miles south of Denver, it interchanges with the Rock Island and the Santa Fe. At Pueblo, 119 miles south of Denver, it interchanges with the Missouri Pacific Railroad Company (Guy A. Thompson, trustee), the Santa Fe, and the Colorado & Southern. At Walsenburg, 51 miles farther south, it interchanges with the Colorado & Southern. At Trinidad, a short distance from the Colorado-New Mexico State line and 92 miles south of Pueblo, it interchanges with the Colorado & Southern and the Santa Fe.

Western connections of the Rio Grande are in Utah at Ogden, Salt Lake City and Provo. At Ogden, the connecting lines are the Union Pacific and the Southern Pacific. At Salt Lake City, 37 miles south of Ogden, the connections are the Western Pacific and the Los Angeles line of the Union Pacific. At Provo, 44 miles south of Salt Lake City, it again connects with the Union Pacific's Los Angeles line.

Since 1890, when its standard-gage line was completed between Denver and Ogden via Pueblo, the Rio Grande, through its eastern and western connections, has been a part of several transcontinental routes. It now participates in through routes and joint rates on equal terms with other carriers on transcontinental traffic between (1) points in an area generally described as west of a line beginning at Vancouver, British Columbia, thence south, just east of Seattle and Portland, and southeasterly to a point west of Ogden and Salt Lake City, crossing the line of the Union Pacific at Lynndyl, Utah, 118 miles west of Salt Lake City, and thence southwesterly, east of the Union Pacific's Los Angeles line, to a point

south of San Diego, Calif., and (2) all points in the United States east of a line beginning at the Canadian border and extending southward along the Montana-North Dakota State line and the western border of South Dakota, thence southwesterly through the extreme southeastern portion of Wyoming, west of Cheyenne, and the eastern part of Colorado just west of Denver, Pueblo, and Trinidad, thence southwest and south through the central or western part of New Mexico to a point just west of El Paso. However, joint rates generally do not apply in connection with the Rio Grande on transcontinental traffic originating at or destined to points in Utah north of Ogden, and in Idaho, Montana, Oregon, and Washington east of the line first described. Joint rates apply on such traffic over the Union Pacific through Wyoming, but if routed over the Rio Grande such traffic would move at higher combinations of rates to and from Ogden or Salt Lake City.

The area in Utah north of Ogden, and in Idaho, Montana, Oregon, and Washington, to and from which joint rates generally do not apply in connection with the Union Pacific and the Rio Grande, will be referred to as the excluded territory. Transcontinental traffic to or from such territory ordinarily moves over the Union Pacific from or to Colorado or Missouri River gateways, rather than over the Rio Grande route because the Union Pacific routes are shorter and, as stated, joint rates are not available over the Rio Grande route. The Rio Grande desires to participate as a bridge line on such traffic via its Colorado gateways and Ogden at the joint through rates. This also would include traffic to or from points in the excluded territory on lines which join with the Union Pacific in joint rates.

Representative origins, destinations, commodities, rates distances, average loadings per car, and revenues per car-mile are shown in an appendix to this report, for east-bound and west-bound movements, compiled from exhibits of record. The distances shown are those over existing routes over the Union Pacific and its connections by which joint through rates apply, and over the Rio Grande and its connections over which combination rates apply. Revenues per car-mile are computed for such rates and distances and, in addition, for the distances over the Rio Grande at joint rates on the same basis as those over the Union Pacific routes, as sought herein.

Traffic between the excluded territory and Colorado common-point territory (points in eastern Colorado from Denver south to Trinidad and west to Canon City) generally must move over the Union Pacific through Denver to get the lowest rate. Similarly, traffic between the excluded territory and Utah common-point territory (points in Utah from Ogden south to Provo and Payson) generally must move over the Union Pacific to get the lowest rate. There are some exceptions, however, with respect to rates between Utah common points on the Rio Grande and the northwest area on livestock, lumber, grain, and other commodities.

An analysis of distances from and to 5 representative points[4] on the Union Pacific in Utah north of Ogden, and in Idaho and Washington, to 14 destinations, Denver and east, over restricted routes of the Union Pacific for distances, computed over the short routes, ranging from 649 miles to Denver to 3,279 to Boston, Mass., shows that routes via Ogden and the Rio Grande to the same points

4 Logan, Utah; Boise, Idaho Falls, and Twin Falls, Idaho; and Spokane, Wash.

are longer by from 1 percent (from Spokane to New Orleans, La.) to 16 percent (from Idaho Falls to Kansas City). To the same destinations from nine other representative points[5] on the Union Pacific, from which through routes and joint rates are available in connection with the Chicago, Milwaukee, St. Paul, and Pacific Railroad Company, referred to as the Milwaukee, the Great Northern, the Northern Pacific, or the Southern Pacific, the routes via Ogden and the Rio Grande would be longer than the short workable and service routes by from 1 percent (from Seattle to Fort Worth, Tex., and Oklahoma City, Okla.) to 37.5 percent (from Yakima to Minneapolis, Minn.). To Minneapolis from seven of the nine origin points, the routes via the Great Northern form the short workable and service routes.

The Ogden-gateway routes of the Union Pacific consist of two lines. The Los Angeles line runs southwesterly through Salt Lake City, Provo, and Delta, Utah, Caliente and Las Vegas, Nev., and Barstow, Calif., to Los Angeles. Through routes with joint rates are maintained over that route in connection with the Rio Grande, as hereinbefore described. The other line of the Union Pacific runs north from Ogden, 111 miles to McCammon in southeastern Idaho. At that point it meets the Wyoming line of the Union Pacific leading west 186 miles from Granger, the junction point with the main line through Cheyenne to Ogden from the east. From McCammon the line extends north to Pocatello, Idaho, 22 miles, and from that point the main line runs in a northwesterly direction across Idaho into Oregon and Washington. From Pocatello another line extends northerly to Butte. From

5 Hood River, Milton, Pendleton, Portland, Elgin, and Redmond, Oreg., and Yakima, Kent, and Seattle, Wash.

Cheyenne, the main line extends east across Nebraska to Omaha, 507 miles, and south to Denver, 109 miles. From Ogden through Granger to Cheyenne the distance is 483 miles.

All shipments to or from points in Idaho, Montana, Oregon, and Washington north or west of McCammon over present Union Pacific routes, or over routes through Ogden and the Rio Grande, must pass through McCammon. That point therefore, is used as the point of divergence in computing distances over the Union Pacific routes and the routes over the Rio Grande by way of Ogden. A shipment from McCammon over the Union Pacific to Cheyenne would move 529 miles; and to the Denver gateway, also over the Union Pacific, 623 miles. But over the Union Pacific to Ogden, thence the Rio Grande to the Denver gateway, the shipment would move 718 miles, or 198 miles farther than over the Union Pacific route to Cheyenne and 95 miles farther than over its route to Denver. On shipments carried through to the Missouri River and points east, the Union Pacific route through Cheyenne also has the advantage in distance.

From Cheyenne to Kansas City a shipment would move 624 miles, as compared with 636 miles for a movement off the Rio Grande from Denver to Kansas City over the Rock Island, its short-line connection. A through shipment, therefore, from McCammon to Kansas City over the direct line of the Union Pacific through Granger and Cheyenne would move 1,153 miles, as compared with 1,352 miles, 199 miles longer, via Ogden and the Rio Grande to Denver, thence the Rock Island. The latter route on such a shipment would be 17.2 percent circuitous. To points east of Kansas City the maximum excess mileage from McCammon over the Rio Grande route is on a

haul to Pittsburgh, Pa. Over the Union Pacific to Omaha, thence the Chicago & North Western to Chicago, Ill., and The Pennsylvania Railroad Company beyond, the haul would be 1,991 miles, and over the Union Pacific to Ogden, the Rio Grande to Denver, the Burlington to Chicago, thence the Pennsylvania, the haul would be 2,203 miles, 212 miles longer, or a circuity of 10.7 percent.

In the following table are shown representative destinations and the distances from McCammon over routes using the Rio Grande from Ogden to Denver, as compared with distances over routes using the Union Pacific through Wyoming. Joint through rates apply over the latter routes. Over routes that include the Rio Grande higher combination rates apply. The table does not contain complete routing, except over the Union Pacific direct to Omaha and Kansas City. The last column of the table shows the percentages by which the Rio Grande routes are longer, or the circuity, from the point of divergence, McCammon, to the points shown.

From McCammon, Idaho, to—	Via Union Pacific	Distance	Via Rio Grande	Distance	Difference	Circuity via Rio Grande
		Miles		Miles	Miles	Percent
Omaha, Nebr.	(1)	1,036	(2)	1,255	219	21.1
Kansas City, Mo.	(3)	1,153	(2)	1,352	199	17.2
Minneapolis, Minn.	(3)	1,396	(2)	1,593	197	14.1
St. Louis, Mo.	(3)	1,428	(2)	1,627	199	13.9
Chicago, Ill.	(1)	1,524	(2)	1,735	211	13.8
Pittsburgh, Pa.	(1)	1,991	(2)	2,203	212	10.7
Charleston, W. Va.	(3)	2,018	(2)	2,218	200	10.0
Columbia, S. C.	(3)	2,274	(2)	2,473	199	8.8
Baltimore, Md.	(1)	2,319	(2)	2,521	202	8.7
Norfolk, Va.	(3)	2,438	(2)	2,637	199	8.2
New York, N. Y.	(1)	2,477	(2)	2,674	197	8.0
Tulsa, Okla.	(4)	1,377	(5)	1,427	50	3.6
Dallas, Tex.	(6)	1,456	(5)	1,489	33	2.3
Fort Smith, Ark.	(4)	1,458	(5)	1,538	80	5.5
Memphis, Tenn.	(3)	1,593	(5)	1,786	193	12.1
New Orleans, La.	(6)	1,970	(5)	2,003	33	1.7
Atlanta, Ga.	(3)	2,044	(5)	2,204	160	7.8
Savannah, Ga.	(3)	2,327	(5)	2,486	159	6.8

1 Union Pacific through Wyoming to Omaha.
2 Union Pacific to Ogden, Rio Grande to Denver.
3 Union Pacific through Wyoming to Kansas City.
4 Union Pacific to Pacific Junction, Kans.
5 Union Pacific to Ogden, Rio Grande to Pueblo.
6 Union Pacific to Denver, Colorado & Southern to Sixala, N. Mex.

The differences in the distances to destinations in the Southwest over routes including the Rio Grande from points in the excluded territory, as compared with the Union Pacific routes through Wyoming, are much less than they are to Missouri River crossings and points east and southeast. About 90 per cent of the traffic upon which joint through rates are sought via Ogden and the Rio Grande moves to the latter areas, and about 10 percent to the Southwest.

Over its routes through Wyoming, the Union Pacific gets its long haul from McCammon to Omaha, 1,036 miles, and to Kansas City, 1,153 miles. If joint rates were prescribed over the Union Pacific to Ogden and the Rio Grande to Denver, the Union Pacific's haul from McCammon to Ogden on traffic to Omaha or Kansas City and beyond would be 111 miles. However, if such traffic were routed beyond Denver over the Union Pacific, the latter would get a further haul of 560 miles to Omaha via Julesburg, or 640 miles to Kansas City via Salina, Kans., a total haul from McCammon of 671 miles to Omaha or 751 miles to Kansas City. Joint through rates are in effect over that route on sheep from Union Pacific origins in southern Idaho and eastern Oregon, but are 19 cents higher to the Missouri River and east (20 cents to Chicago) than rates over more direct routes of the Union Pacific. That railroad would establish a similar basis on cattle if requested. Over the route in connection with the Rio Grande, it would lose its haul of 529 miles from McCammon to Cheyenne, or 623 miles to Denver. On traffic routed via Ogden, the Rio Grande, and Pueblo to destinations east thereof, the Union Pacific would not be in a position to get any additional haul.

All of the foregoing distances, as stated, are computed from McCammon as the point of divergence. The great bulk of the traffic, however, from the excluded territory in Idaho, Montana, Oregon, and Washington originates or terminates on the Union Pacific or its connections west and north of that junction. On such traffic the Union Pacific would have a substantial haul in addition to that of 111 miles from McCammon to Ogden.

The hauls to Ogden would be, for example, from Lewiston, Idaho, 847 miles; from Centralia, Wash., 937 miles; and from Seattle, 1,029 miles. Over the Union Pacific direct from those respective origins to Omaha, the hauls would be 1,772, 1,862, and 1,954 miles. Those figures show the extent to which the Union Pacific would lose its long haul, the loss in mileage being 925 miles in each instance.

From and to points in the excluded territory in Oregon and Washington, and on the Burke and Headquarters branches of the Union Pacific in northern Idaho, the Union Pacific and certain other defendants have arrangements for the interchange of traffic in various commodities at junctions or gateways in Oregon, Washington, and Idaho, under joint rates. On traffic through such gateways moving under the joint rates, the Union Pacific in many instances foregoes its long haul. The gateways through which the rates are in effect, with certain limitations upon their application specified in the tariffs, are: Portland, in connection with the Southern Pacific; Marengo, Wash., and Plummer, Idaho, in connection with the Milwaukee; Spokane, in connection with the Great Northern; Wallula, Wash., and Spokane, in connection with the Northern Pacific; and Spokane, in connection with the Spokane International Railroad Company con-

necting with the Canadian Pacific Railway Company at Eastport, Idaho, at the Canadian border.

Illustrative of the hauls over the Union Pacific on traffic routed through these gateways are the following: From Lewiston, 132 miles via Marengo or 193 miles via Spokane; from Centralia, 393 miles on a route through Marengo; from Seattle, 184 miles through Portland; and from Pendleton, Oreg., 165 miles via Marengo, 227 miles via Spokane, or 70 miles via Wallula, Wash.; on traffic routed over its connections at such points. If joint rates were established from the same origin points to Omaha and beyond via Ogden and the Rio Grande, the hauls of the Union Pacific to Ogden would be substantially greater than many of its hauls via other junctions with its connections, as illustrated.

For example, from Pendleton, a representative point, on traffic to Chicago the Union Pacific has a haul of 1,560 miles on its route through Omaha, but only 70 miles over an established through route via Wallula and the Northern Pacific and connections. The rates are the same over both routes. Over a route via Ogden and the Rio Grande to Denver, thence the Burlington, the distance is 2,257 miles, or 6.4 percent longer than the route via Wallula and 10.4 per cent longer than the Union Pacific route through Omaha. The Union Pacific's haul over the Rio Grande route would be 633 miles. From Pendleton to St. Louis, the Rio Grande route sought would be shorter by 168 miles than a through route now available via Spokane and the Spokane International and its connections, and would be 201 miles, or 10.3 percent, longer than the Union Pacific route through Kansas City. To Oklahoma City, Okla., the haul of the Union Pacific would be increased from 227 miles, over the present route via Wal-

lula and the Northern Pacific and connections, to 633 miles via Ogden and the Rio Grande to Pueblo and the Santa Fe beyond. The distance over the latter route is 1,910 miles, or only 34 miles, 1.3 percent, longer than the route which gives the Union Pacific its long haul, and 692 miles, or 36.2 percent, shorter than the foregoing route through Wallula.

The foregoing are illustrative of numerous established through routes in which the Union Pacific participates from points in the excluded territory which short haul that carrier. Many of such routes are longer than those here sought via Ogden and the Rio Grande, and this is true to all sections of the country east of the Rocky Mountains, except western trunk-line territory. To the latter territory the short-hauling routes are generally shorter than the routes by which the Union Pacific retains its long haul, and considerably shorter, for example, by 37.5 percent from Yakima to Minneapolis, than the routes sought via Ogden and the Rio Grande. As indicated, the portion of the excluded territory from and to which this short hauling of the Union Pacific occurs does not include points in Utah nor points in Idaho, except on the Burke and Headquarters branches of the Union Pacific in the northern portion of that State.

These short-hauling routes have been in effect for many years. Most of them were established prior to the dates when the Union Pacific assumed control of the portions of its line west of Huntington and south of Salt Lake City. Joint rates with the Southern Pacific through Portland have been in effect since about 1910, with the Milwaukee through Marengo and Plummer since about 1902, with the Great Northern through Spokane since about 1894, with the Northern Pacific through Wallula

since about 1883, and with the Spokane International through Spokane since about 1907.

On some of the traffic interchanged at these gateways the Union Pacific obtains a short haul, as compared with its connections, and on other traffic a long haul. Eastbound traffic through the specified Washington and Idaho gateways consists of apples, pears, lumber and other forest products, some steel products, and miscellaneous commodities. A large portion of the traffic, particularly lumber, moves to North and South Dakota, Minnesota, and Wisconsin over the northern routes. Traffic over such routes moves also to Midwestern States and to States east of the Mississippi River. West-bound traffic through the same gateways consists of manufactured products and miscellaneous commodities from the Middle West and from eastern and southern territories.

These interchange arrangements are warranted and in the public interest, according to the defendants, because each carrier shares in long hauls on some traffic as well as short hauls on other traffic, and because the arrangements make it possible for the carriers to handle traffic over shorter routes in many instances. This latter statement, however, applies only, except to an insignificant extent, to such routes to and from points in western trunk-line territory.

As indicated, through routes and joint rates apply in connection with the Rio Grande through Provo on traffic to or from points on the Los Angeles line of the Union Pacific. Such routes generally are shorter than routes over the Union Pacific direct to or from Omaha, Kansas City, or Denver. The following is illustrative:

From Los Angeles, Calif., to—	Via Union Pacific	Distance	Via Rio Grande	Distance
		Miles		Miles
Omaha, Nebr.	(1)	1,808	(2)	1,813
Minneapolis, Minn.	(1)	2,168	(2)	2,152
Kansas City, Mo.	(3)	1,925	(2)	1,911
St. Louis, Mo.	(3)	2,200	(2)	2,185
Denver, Colo.	(4)	1,395	(2)	1,276
Chicago, Ill.	(1)	2,296	(2)	2,293
Atlanta, Ga.	(3)	2,816	(5)	2,762
Little Rock, Ark.	(3)	2,430	(5)	2,272
Dallas, Tex.	(4)	2,226	(5)	2,045

1 Union Pacific to Omaha.
2 Union Pacific to Provo and Rio Grande to Denver.
3 Union Pacific to Kansas City.
4 Union Pacific to Denver.
5 Union Pacific to Provo and Rio Grande to Pueblo.

Other defendants also participate in through routes with joint rates on traffic moving to or from points on the Union Pacific in the excluded territory from and to eastern points and voluntarily forego their long hauls. For example, the Burlington, the Rock Island, the Santa Fe, and the Missouri Pacific participate in joint rates with the Union Pacific through Kansas City and Omaha. The railroads named could haul the traffic for longer distances over their own rails to Pueblo, Denver, or Cheyenne, instead of permitting shippers to route through Kansas City and Omaha in connection with the Union Pacific.

The total amount of traffic moving between the four Northwestern States and points east of the Colorado common points is substantial. According to figures computed by the Union Pacific, transcontinental carload traffic from the East in the year 1948 over the Union Pacific through Wyoming to those Northwestern States totaled 55,631 cars. Of these, (1) 81.7 percent originated in eastern

Colorado, Kansas, Missouri, Kentucky, Virginia and all States north thereof, (2) 10.8 percent in Texas, Oklahoma, Arkansas, and Louisiana, and (3) 7.5 percent in Tennessee, Mississippi, Alabama, Georgia, Florida, North Carolina, and South Carolina. About 62 percent of the total consisted of manufactures and miscellaneous traffic, most of which originated in group (1). East-bound traffic from the four States to the same three groups in the same year totaled 116,278 carloads, of which 84.1 percent went to group (1), 10.5 percent to group (2), and 5.4 percent to group (3). About 75 percent of that total consisted of agricultural and forest products.

Of the total carloads, 171,909 in both directions, 121,909 originated or terminated in the excluded territory and the remainder, 50,000, originated or terminated at points in Oregon and Washington west of that territory. The Rio Grande is in a position to solicit movements of the latter traffic over its line at competitive joint through rates in connection with longer routes over the Southern Pacific from Portland to Ogden or over the Great Northern to Bieber, Calif., and the Western Pacific to Salt Lake City. These joint rates are the same as the rates which apply over the direct routes of the Union Pacific from origins on that road in the same area west of the excluded territory. For example, from Seattle to Denver the distance is 1,538 miles over the Union Pacific direct and 1,894 miles over the Union Pacific to Portland, the Southern Pacific to Ogden, and the Rio Grande beyond. In addition to the joint rates sought via the Ogden gateway from the excluded territory, the complainant is also seeking joint rates from the northwest area west of the excluded territory, the same as those in effect over the Union Pacific, Southern Pacific, and Great Northern-

Western Pacific routes, for application in connection with the Union Pacific via the Ogden gateway.

A substantial volume of traffic is handled by the Rio Grande in connection with the described routes over which it participates in competitive joint through rates to and from Oregon, Washington, and British Columbia. For example, in 1948 the Rio Grande handled 30,486 carloads in connection with the Southern Pacific and 7,152 carloads in connection with the Western Pacific-Great Northern. In 1947, the volume was 22,722 and 8,909 carloads over the respective routes. Most of this consisted of lumber from Southern Pacific origins south of Portland.[6]

The complainant's estimate of the traffic in carloads that would be potentially available to and from the excluded territory for solicitation by the Rio Grande, in the event competitive joint rates were established over its line via Ogden, from Idaho, Montana, Oregon, and Washington is about 29 percent greater than the volume of traffic, according to the Union Pacific, that moved in 1948 over its Wyoming lines. The estimate was based upon the total carload traffic originated and terminated by the Union Pacific in the years 1944 to 1948, inclusive. It included commodities within the description of products of agriculture, animals and animal products, products of mines, products of forests, and manufactures and miscellaneous commodities. The total carloads estimated as ori-

6 Prior to February 1, 1949, joint rates applied over the Bieber route in connection with the Rio Grande to competitive territory in Colorado and east thereof on lumber from certain origins in Oregon and Washington on the Oregon Trunk Railway and the Spokane, Portland and Seattle Railway Company (subsidiaries of the Great Northern and Northern Pacific). Those rates were canceled on February 1, 1949, in connection with the Rio Grande; there is no indication that the cancellation was protested.

ginated by the Union Pacific annually in the area specified was 101,476 and the number terminated 56,286, a total "potential" of 157,762 carloads.

This estimate did not include any shipments that might originate or terminate off the line of the Union Pacific and moved over that carrier as a part of a longer haul. Although stated to be a conservative estimate of potential traffic, it was computed from a substantial number of reliable sources, and represents the complainant's best analysis of the traffic considered available for solicitation. No attempt was made to estimate the amount of traffic that the Rio Grande might actually obtain from these potential sources other than a statement that there was no probability that it would get more than 10 percent and that the amount probably would be less than 10 percent because of the vigorous competition of the Union Pacific. This figure of 10 percent as a maximum was derived from the experience of the Rio Grande in obtaining other transcontinental traffic now moving at joint rates in competition with the Santa Fe, Southern Pacific, Union Pacific, Great Northern, Northern Pacific, and Milwaukee. If the Ogden gateway were opened to traffic to and from the four States named, there would be active competition with the Union Pacific, the Wabash, the Chicago & North Western, and the Missouri River connections that favor Union Pacific routing. At the present time the Rio Grande gets less than 5 percent of the traffic to and from California over the available through routes, with joint rates in connection with its line, because of competition with other routes.

A transportation specialist of the United States Department of Agriculture testified that the Rio Grande would be doing well if it obtained 1,000 cars additional

annually from this traffic, an amount that is less than 1 percent of the estimated potential total traffic.

Whatever the amount, it would be the result mainly of (*a*) active solicitation by the Rio Grande to persuade shippers and receivers of freight to use its line as an overhead or bridge route, and (*b*) the value of its service to shippers. It would also depend upon the extent to which the Rio Grande and receivers of freight on its line use, and can induce shippers to use, transit facilities available on that line so as to attract the movement of commodities thereto for various purposes for subsequent reshipment beyond at the balance of the joint through rates from the point of origin. The development of such activities is of particular interest to shippers and receivers of freight on the Rio Grande. This is indicated by the growth of traffic over that railroad in the 15-year period, 1934 to 1948, inclusive, and by the testimony of shippers and receivers served by it.

Since 1934, when the Dotsero cut-off was constructed, affording a shorter route by the Rio Grande between Denver and the Utah gateways, there has been a marked increase in the traffic carried over that railroad. For the 2 years prior thereto, the total tons carried were less than 6,000,000 although the tons carried exceeded that figure in each year before that, back to 1924. Beginning in 1934, the traffic gradually increased and reached a maximum of 18,517,000 tons in the war year of 1944. In 1945 it dropped to 14,213,000 tons, but increased in 1947 to 18,331,000 tons and in 1948 to 18,473,000 tons. This tonnage has shown a considerable increase percentagewise in traffic received from connecting lines and a decrease in traffic originated. In 1924, 23.2 percent was received from connections and 76.8 percent originated. In 1934, the respective percent-

ages were 39.3 and 60.7. In 1947, they were 49.8 and 50.2, and in 1948 they were 52.3 and 47.7 percent. This traffic in 1948 did not differ markedly from the traffic handled in the four war years 1942-45, when the percentages of traffic received from connections ranged from 52.6 percent in 1942 to 58.2 percent in 1945.

Of the traffic received from connections in the 15-year period 1934 to 1948, inclusive, the percentage terminated on the line of the Rio Grande has ranged from 16.4 percent in 1941 to 20.7 percent in 1948. In the war years the percentages were 16.7 to 19.9 percent. In the same 15-year period, of the traffic received from connections, the amount delivered to connections, that is, bridge traffic ranged from 20.7 percent in 1935 to 39.6 percent in the war year of 1945. Excluding the war years, the percentage of traffic received from connections that was delivered to connections was 30.1 percent in 1947 and 31.6 percent in 1948. In 1934, the corresponding percentage was 21.7 percent and in 1924 it was 9 percent. These percentages show the increasing importance of the Rio Grande as a bridge line. In tons of freight carried in 1947, such traffic accounted for 5,519,239 tons out of a total of 18,331,176 tons, and in 1948 accounted for 5,846,793 tons of a total of 18,473,356 tons carried. In revenue, the Rio Grande received in 1947 from its bridge traffic $22,894,412, which was 43.3 percent of its total revenue of $52,883,339; and in 1948. $27,654,086 or 44.2 percent of its total revenue of $62,505,951.

Although the percentage relation of the traffic originated on the Rio Grande to the total traffic of that carrier has decreased, such traffic both in tonnage and revenue has increased in the same 15-year period. In 1934, the tons originated were 3,826,049 and the revenue received therefrom was $8,311,254; in 1947, the tons originated were 9,202,867 and the revenue therefrom $20,190,318; and in

1948, the corresponding figures were 8,804,334 tons and $22,018,519. The 1947 and 1948 figures exceeded those of the war years. The volume of strictly local traffic; that is, traffic both originated and terminated on the line, also increased; this traffic in 1934, for example, accounted for 2,048,544 tons and $4,351,807 in revenue, and in 1948, for 3,307,374 tons and $7,630,587. Strictly local traffic was less annually throughout the 15-year period, including the war years, than during the 6-year period 1924 to 1929, inclusive.

The reasons given for the decline or lack of proportionate growth in traffic originated are (1) depletion of nonferrous ores in Colorado and the closing of smelters, except one now operating at Leadville, Colo.; (2) decline in the amount of coal originating on the road; (3) decline in production of lumber and its products in the area served, and the discontinuance of operation by many sawmills; and (4) loss of local traffic to other forms of transportation.

The relative decline in strictly local traffic has been offset by increases in traffic originated and shipped out over connecting lines, and traffic received from connecting lines and terminated. Such traffic affords a measure of the increasing importance of the Rio Grande to the shippers and receivers of freight in the localities and areas in the States of Colorado and Utah served by it. Although percentagewise, bridge traffic in relation to the total was greater in 1948 than in 1934, and increased by over 326 percent in the 15-year period, traffic originated or terminated also increased by substantial amounts, or over 155 percent. In terms of revenue, however, less was received from bridge traffic than from the other traffic. In 1934, for example, the Rio Grande received from bridge traffic $5,648,891, and

in 1948 it received $27,654,086; from the other traffic, it received $11,519,335 in 1934 and $34,851,865 in 1948.

The record shows that both the Rio Grande and the Union Pacific sought to interest the public in the controversy and to inform other persons, especially shippers, as to the merits of their respective views. For example, the Rio Grande issued a pamphlet entitled "20 Questions" as a means of informing the public of the Rio Grande's side of the case and its reasons for seeking opening of the gateway. In its brief, the Railroad Commission of the State of Montana states that it had informal conferences with official representives of both the complainant and the defendants before it intervened in the proceeding. A number of witnesses related that they had listened to representatives of both sides before appearing to give testimony. All witnesses were men of responsibility in their communities and were successfully engaged in their respective occupations. Many appeared and testified as representatives of large groups of producers, shippers, and receivers of freight in their areas. There is no indication that these witnesses, whether for or against the complaint, were improperly influenced, or that their respective interests in the subject matter of the controversy had been stimulated in any questionable manner.

Transit.—In transportation by rail, arrangements offered by railroads to shippers under which shipments may be stopped in transit for various commercial operations and reshipped at the balance of the joint rate from the point of origin are of great value to shippers, receivers, and distributors of freight. They are of substantial value in many marketing operations and permit a freer flow of traffic through the transit points.

The Rio Grande, like other railroads, offers a large number of such transit arrangements, including stops for partial loading or unloading, storage, processing, washing and packing fruits, sorting and consolidating commodities, concentration, milling, fabrication, assembling and distributing, and, in the case of livestock, grazing and feeding. Such arrangements are of importance to shippers and receivers in the territory served by the Rio Grande. Traffic from the excluded territory consists of perishable commodities, other agricultural products, milled products, livestock, and lumber and its products. West-bound traffic to that territory is made up for the most part of manufactures and partially manufactured articles, some of which are stopped for storage, partial unloading at a number of points, and fabrication in transit.

On traffic from Colorado common points and points east thereof through Pueblo, Colorado Springs, or Grand Junction, and Price, Utah, to final destinations north or west of Ogden on the Union Pacific or points on its connecting lines, failure to have joint through rates in connection with the Rio Grande hinders the use of the stoppage-in-transit arrangements offered by that railroad at such Rio Grande points. Pueblo has a population of about 75,000; Colorado Springs, 50,000; Grand Junction, 17,500; and Price, 5,000. All of these are distributing points for surrounding areas. A shipper at Chicago, for example, may have a carload containing shipments for consignees at Pueblo and Boise, Idaho. If the car is partially unloaded at Pueblo it cannot be reshipped over the Rio Grande to Boise at a joint through rate; but the car can be moved to Boise via Pueblo and Denver, thence the Union Pacific at a joint through rate. If stops are desired on the Rio Grande at Grand Junction, Price, or Provo, for example, joint through rates would not be available.

A discussion of the evidence offered by shippers and receivers of particular commodities who testified in support of the complainant follows:

Building Materials.—A dealer in and distributor of general building materials in Salt Lake City, who handles from 400 to 500 carloads annually, obtains from 150 to 200 cars from points east of Colorado common points, including cellotex from Marrero, La., roofing from Cincinnati, Ohio, doors from Louisville, Ky., hardwoods and plywoods from Algoma, Wis., and Orangeburg, N. C., asbestos products from St. Louis, and asphalt siding from Minneapolis. Distribution is made in carloads, from pool cars, and from warehouses to customers located on the Rio Grande on the western slope of Colorado, such as Glenwood Springs and Grand Junction Colo., and in Utah, such as Price, Helper, Ephraim, and Manti; and also on the Union Pacific in northern Utah; in Wyoming, Rock Springs and west; and in southern Idaho northward to and including Ashton on the West Yellowstone branch and westward to and including Magic, Shoshone, and Buhl. This dealer cannot now serve these customers from shipments made in through cars at joint rates over the Rio Grande when such cars also carry shipments for points on the Union Pacific beyond Ogden. Ephraim and Manti are on a branch line about 52 and 59 miles, respectively, south of Thistle, Utah.

In some instances this shipper has had to forego business east of Salt Lake City at points as far as Glenwood Springs because of the rate situation. If joint through rates were established, this distributor could give customers at a number of intermediate points on the Rio Grande, who generally are small dealers and can take only less-

than-carload quantities, better service through partial unloading in transit and more efficient service by frequent deliveries under more flexible schedules, instead of being limited, as at present to furnishing service in connection with pool cars consigned to Salt Lake City as the ultimate destination. Pool cars with partial loads for that point or Ogden and points on the Union Pacific beyond do not now move over the Rio Grande, but are routed over the Union Pacific to get the benefit of joint rates.

Of the 150 or more cars annually from the east, this distributor estimated that he would have stopped for partial unloading about 25 percent. Witness made no mention of commercial competition, but indicated that his chief concern was better service to his customers and a saving in cost to his company if such carloads could be stopped for partial unloading at intermediate points on the Rio Grande while moving at the through rates to Union Pacific destinations in the area served by him.

Farm machinery.—A distributor of farm machinery and equipment at Salt Lake City receives carloads of these commodities from eastern origins, including farm tractors from Detroit, Mich., and distributes them by his own motor vehicles to points in Utah and Idaho. This business was established in 1947, at which time the production of these commodities was insufficient to meet all demands, and a system of allocations based on prior needs was introduced. While the system of allocations was in effect, it was found to be more convenient and efficient to bring all shipments to Salt Lake City and distribute them by truck. This distributor is located on the Rio Grande at Salt Lake City and all shipments move over that line. He expressed a desire for joint through rates from eastern origins to points in

Utah and Idaho in connection with the Rio Grande, but admitted that no attempt was being made to partially unload shipments at points on the Rio Grande south of Salt Lake City when carloads are consigned to the latter point, or to ship over the Union Pacific to Salt Lake City where carloads could be partially unloaded or stored and later shipped to Union Pacific destinations in Utah and Idaho at joint through rates. The witness for this distributor stated that he preferred to ship in-bound over the Rio Grande and forego the stopping-in-transit provisions that are now in effect at Salt Lake City and other points on the Union Pacific when traffic is routed over that line.

A factory branch of a large manufacturer of farm machinery and equipment which distributes in the intermountain area is located on the Rio Grande at Salt Lake City. In 1949 it received 369 carloads from its eastern manufacturing points. Of these, 70 percent were sold at points north of Salt Lake City, mostly at points served by the Union Pacific as far as Ontario, Oreg., and the remainder in Utah and western Colorado. About one-half of the shipments to Salt Lake City moved over the Rio Grande route and one-half over the Union Pacific. Shipments which move in over the Union Pacific may be stopped at Salt Lake City for partial unloading or storage in transit at the joint through rates when the ultimate destinations are on the lines of that carrier, but combinations of rates to and from Salt Lake City apply when such shipments move into that point over the Rio Grande. The manager of this branch testified that it would be desirable to establish joint through rates over the Rio Grande so that shipments moving over that line could be stored in transit at Salt Lake City and later reshipped, or partially unloaded thereat and the remainder forwarded to points on the Union Pacific at charges no greater than apply on similar

shipments moving over the Union Pacific. However he did not know what effect this would have on the parent company as some shipments have been routed over the Rio Grande when Union Pacific routing was requested. To indicate a need for joint through rates reference was made to a shipment of tractors which were routed over the Rio Grande to Salt Lake City. At that time a customer at Ontario needed two tractors and it cost about $50 each to ship them from Salt Lake City by motor carrier. If joint through rates had been in effect the car could have been partially unloaded at Salt Lake City and the two tractors could have been forwarded to Ontario at the joint rate from origin to Ontario. The record fails to show the difference in the joint rates to Salt Lake City and to Ontario. On a 34,000-pound shipment of tractors from Chicago, the joint through rate is $2.68 to Ogden and $2.98 to Boise, which is southeast of Ontario, representing a difference of $102 in charges.

Monuments.—A fabricator and wholesaler of granite and marble monuments at Brigham City, Utah, on the Union Pacific 21 miles north of Ogden, obtains his stone from Vermont, Georgia, Wisconsin, and Minnesota and sells in Colorado, Utah, Idaho, Wyoming, Montana, Oregon, and Washington. This dealer has keen competition with dealers in like articles in Salt Lake City. Its business is such that straight carloads rarely can be shipped to retailers. If joint through rates were established over the Rio Grande through Ogden, cars could be stopped in transit at Colorado points, such as Grand Junction. A retailer at the latter point testified that he finds it impracticable, except in unusual instances, to purchase the various kinds of monuments needed in the trade in carloads, and that the keen competition cannot be met when

shipments are made in less than carloads. There is thus an urgent need for the establishment of joint through rates on this traffic to destinations in the excluded territory with stop-off privileges at intermediate points on the Rio Grande. A substantial portion of this traffic has been lost to the trucks, chiefly because of rate differences and the lack of stop-off privileges on the Rio Grande at competitive through rates.

Livestock.—Large volumes of traffic are involved in connection with the livestock industry and with the processing and marketing of agricultural products. With respect to livestock, evidence was submitted by producers, feeders, and marketers. A number of producers in the northwest area, particularly in Idaho at such points as Pocatello, Burley, Soda Springs, and Blackfoot, desire joint rates via Ogden and the Rio Grande to markets in Denver, Pueblo, and east thereof on the same basis that applies on shipments moved over the Union Pacific through Cheyenne. Much of the evidence dealt with the advantages from such joint rates when applied on livestock shipped to grazing and feeding areas in Utah and Colorado on the Rio Grande for reshipment beyond under transit arrangements. In the areas in Utah and Colorado served by the Rio Grande are good pasture lands for grazing livestock. In addition to livestock produced locally in those areas, substantial quantities are shipped in the summer season from other sections of Colorado, Utah, and surrounding States, both for feeding in feed lots and pastures and for grazing on the livestock ranges. Movements of livestock, both sheep and cattle, into and out of Colorado are substantial in volume.

Evidence as to the needs of raisers of livestock and operators engaged in fattening livestock for markets was

submitted by persons engaged in those pursuits, individually and as representatives of livestock and feeder associations. These came from several representative points or districts served by the Rio Grande, such as Heber City and La Sal, Utah, and Burns, Lamar, and Las Animas, Colo. Those served only by the Rio Grande generally buy from areas from which joint rates apply in connection with that road in order to obtain the benefit of grazing or feeding in transit on feeder stock when the fattened animals are shipped to Denver or markets east thereof. The evidence shows that such operators have to absorb the difference in transportation costs and are not able to purchase cattle or sheep economically in the northwest area in competition with buyers from Iowa, Wyoming, Nebraska, Colorado, and Kansas that have the benefit of competitive joint rates from the excluded territory over Union Pacific routes with grazing or feeding in transit arrangements.

Due to the curtailment of the use of grazing lands in national forests in Colorado, as part of a general policy for all such forest lands, livestock raisers in Colorado have curtailed their operations in raising livestock, and have engaged more in fattening stock by grazing in private pastures or feeding in feed lots. They purchase most of their feeder stock in Colorado and surrounding areas, but for supply, quality and price reasons they have been seeking some feeder stock from more distant origins, and the need for doing so, particularly by reason of the curtailment of the pasture area, has been increasing. Livestock produced in the northwest area, particularly in Idaho, Montana, and Oregon, is of excellent grade, does well on the range, and is considered very desirable for feeding and breeding purposes. About 90 percent of the

sheep produced in Colorado are produced in the area served by the Rio Grande, and the operators in this territory purchase replacement or breeding ewes in the excluded territory for summer grazing and the production of white-faced or mutton-type lambs. One witness indicated that in-bound billing on breeding ewes is used under the feeding-in-transit arrangements, when available, at points on the Rio Grande when the new-born, fattened lambs are shipped to markets, but the feeding-in-transit arrangements apparently do not apply for breeding in transit.

Operators on the Rio Grande in western Colorado and those in the eastern Arkansas Valley sections (in southeastern Colorado east of Pueblo and in southwestern Kansas) feel that they cannot now profitably purchase stock in the excluded territory for feeding in transit in competition with similar operators on the Union Pacific in Wyoming, Colorado, Nebraska, and Kansas, due to the rate situation. For example, from Dillon, Mont., to Kansas City the rate on sheep or goats in double-deck cars is $1.21 over the Union Pacific direct and $1.40 over the Union Pacific to Ogden, the Rio Grande to Denver, and the Union Pacific beyond, a difference of 19 cents. The 19-cent differential over the latter route applies generally on sheep and goats from Union Pacific origins in the excluded territory to Missouri River markets and points east thereof. These rates are published as joint rates over through routes via Ogden and the Rio Grande. On sheep and goats to destinations west of the Missouri River, including Colorado common points, and on cattle to all of the territory Colorado common points and east thereof, via Ogden and the Rio Grande, the rates are on a combination basis. Cattle and sheep may be shipped from the excluded territory over the Union Pacific to Denver and con-

meeting lines beyond to points in the Arkansas Valley, such as Lamar, for feeding in transit and subsequent reshipment to Missouri River markets, or markets east thereof, at the rates applicable over the Union Pacific direct to the Missouri River markets, plus an arbitrary of 8.5 cents per 100 pounds. Feeders of livestock located on the Union Pacific in northern Colorado and Nebraska are now able to overbid the Arkansas Valley feeders on northwest stock when destined to the Missouri River and east thereof, and the latter are thus unable to compete successfully because of their unfavorable rate situation. The northern Colorado-Nebraska operators feed a majority of the lambs fattened for market in the United States.

A packing plant at Pueblo purchases lambs at the Ogden market, some of which originate at points on the Union Pacific in Idaho and Oregon. These shipments are routed over the Rio Grande from Ogden even though it costs from $70 to $80 per car more than the total charges would be if the shipments were routed over the Union Pacific to Denver at the transit balance of the through rate. The Rio Grande is used from Ogden because shipments do not have to be stopped for feed and water en route to Pueblo, whereas shipments routed from Ogden over the Union Pacific usually require feed and water at Denver. There is less shrinkage on shipments moved over the Rio Grande, but not enough to offset the additional freight charges.

The rates on livestock in western territory were prescribed in *Livestock, Western District Rates*, 176 I. C. C. 1, 190 I. C. C. 175, 190 I. C. C. 611, 200 I. C. C. 535. Generally, the rates are predicated on the shortest routes over which carload traffic can be moved without transfer

of lading, but the carriers were not required to maintain the rates over such routes where it would result in short hauling within the meaning of section 15 (4) of the act. The rates on stocker or feeder livestock were prescribed on a basis not in excess of 85 percent of the rates prescribed on the same kind of stock when fit for slaughter, and the carriers were authorized to establish tariff provisions which allow stock moving toward a market to be fed in transit at intermediate points on the basis of the through rates plus a reasonable charge for such privilege. On December 6, 1932, the Rio Grande was authorized (190 I. C. C. 175) to add certain arbitraries to the rates prescribed for mountain-Pacific territory for hauls over its standard-gage lines between Pueblo and Walsenburg on the east, and Provo on the west, including branch lines connecting with the main lines between those points. For hauls of 500 miles or more, the arbitrary authorized at that time was 6 cents on cattle and on hogs and sheep, double deck. Later, these same arbitraries were authorized for application between Denver and Provo over the Dotsero cut-off (200 I. C. C. 535).

In establishing the prescribed rates on livestock, the carriers appear to have limited their application over routes which do not result in short hauling, and over other and longer routes to have provided higher rates, either by the addition of arbitraries or the application of the mileage scales over the longer routes, giving consideration to the distance involved. As indicated, operators in the Arkansas Valley may now obtain cattle and sheep in the excluded territory for feeding in transit at an arbitrary of 8.5 cents, and this same arbitrary applies when the stock originates on the Burlington in Montana and Wyoming. On the other hand, such operators may ob-

tain feeder stock in other areas, such as Texas and New Mexico, for feeding in transit and reshipment to the Missouri River markets or markets east thereof, at lower rates than would apply if the same stock were fed in transit by operators on the Union Pacific in Colorado, Nebraska, or Kansas. For example, the rate on cattle from Las Vegas, N. Mex., to Chicago is $1.13 when stopped for feeding at Lamar, but if the same cattle were fed at Barton, Nebr., just east of Julesburg on the Union Pacific, the rate would be $1.26, or 13 cents higher. On cattle from Raton, N. Mex., fed in transit at Lamar, the rates are $1.07 to Chicago and 76 cents to Kansas City, but if the same cattle were fed in transit at Barton the rates would be $1.21 and 89 cents, respectively. Many other examples of a similar nature are shown.

The arbitrary of 19 cents, originally 13 cents, applicable on lambs from the northwest area and moving over the Union Pacific to Ogden, the Rio Grande to Denver, and the Union Pacific beyond was established prior to the opening of the Dotsero cut-off, and was based in part on the mileage over the Rio Grande via Pueblo. The evidence indicates that this arbitrary was based on the difference between the prescribed scale rates for the average distance from 12 representative origins, on the line of the Union Pacific from Pocatello north to Butte and west to Pendleton, to the several Missouri River markets over the Union Pacific direct and over that road to Ogden, the Rio Grande to Denver via Pueblo, and the Union Pacific beyond. Using the same formula, but giving consideration to the shorter distance over the Rio Grande's Dotsero cut-off, the Union Pacific states that the arbitraries on traffic routed over the Rio Grande should be 5 cents to Denver and Pueblo and 15 cents to the Mis-

souri River markets, and it is willing to establish these arbitraries and make them applicable to cattle as well as sheep. The arbitrary of 8.5 cents on cattle and sheep from origins on the Union Pacific and the Burlington when fed in transit at points in the Arkansas Valley and reshipped to the Missouri River and beyond apparently is based on a similar formula. Reasonable groupings were authorized in *Livestock Western District Rates, supra.*

In seeking to have the rates on livestock which apply over the Union Pacific made applicable over its lines from Ogden, the Rio Grande indicates a desire to waive the arbitraries which were authorized over its line from Provo to Denver and Pueblo and, in addition, to have established over its routes lower rates than would result from the application of the prescribed scales for the distances over its routes. On shipments moving over the Union Pacific-Ogden-Rio Grande route, this would result in short hauling the Union Pacific by 512 miles to Denver and 1,042 miles to Kansas City, which are the differences in the Union Pacific distances from McCammon to Ogden and from McCammon to Denver and Kansas City.

Reference is made to *Crouch v. Nevada N. Ry. Co.*, 208 I. C. C. 586, which concerned the rates on feeder cattle moved from East Ely, Nev., to Davis, Calif., over the lines of the Nevada Northern Railway Company to Shafter, Nev., thence the Western Pacific to Sacramento, Calif., and the Southern Pacific beyond, 760.4 miles. A rate of 47.5 cents was applicable over the Nevada Northern to Shafter and the Southern Pacific beyond, 705 miles. This rate was collected, but the defendants later sought to collect a rate of 58 cents, which was the combination rate based on Sacramento. Division 4 found that the combination rate was applicable but unreasonable to the ex-

tent that it exceeded 49.5 cents, which was the prescribed scale rate for distances of 775 miles and over 750 miles. See also *Routing Livestock to and from Oregon Points*, 209 I. C. C. 349. We think, however, that the situation here as to livestock is no different from that portrayed as to certain other commodities with respect to the need for competitive rates over the Rio Grande via the Ogden gateway.

Agricultural commodities.—Growers of wheat, potatoes, onions, peas, other vegetables, and fresh fruits at Idaho Falls, Burley, Twin Falls, Blackfoot, Aberdeen, Caldwell, and Parma on the Union Pacific and also those engaged at such points in buying, selling, packing, and distributing vegetables and fresh fruits, market such products throughout the United States. In order to get as wide a distribution as possible those growers and other growers in the northwest area need as many markets and outlets as possible.

In marketing the large production of such products, particularly Idaho potatoes, it is the general practice to divert carloads in transit as markets are found and sales are made. Routes over which joint through rates apply are generally used so that a shipment can be diverted or reconsigned without the application of a combination of rates. If a shipment reaches a point through which a combination of rates applies and the sale is lost, it is frequently necessary to dispose of the shipment at that point at a forced or distress price. Such points are called closed or pocket markets.

The principal outlets for Idaho fruits and vegetables vary from year to year, but large markets are in the Central, Southwestern, and Southeastern States. Carloads

moved over the Union Pacific to the Central States can be diverted to the Southeastern States at the joint through rates if they move east through Omaha, Kansas City, St. Louis, or Chicago, but if the cars are routed to points in the Southwest over the Union Pacific and connections through Denver they cannot be diverted to southeastern markets east of New Orleans at joint through rates. The southwestern markets are pocket markets in that respect. Idaho producers are in competition with shippers in other producing areas and find it difficult to compete on shipments routed over the Rio Grande via Ogden or Salt Lake City. One Idaho shipper has made few sales of potatoes in the Southwest in the last several years because of pocket markets there.

Wichita and Liberal, Kans., are described as pocket markets on potatoes and other vegetables originating in Idaho because they cannot be diverted or reconsigned therefrom to points east of the Missouri River at joint through rates. However, the record indicates that shipments refused at these two points may be diverted or reconsigned to destinations in the Southwest at the joint through rates. Wichita is not located on the direct line of any carrier operating between the Colorado common points and the Missouri River gateways, and Liberal is located in the southwestern part of Kansas near the Oklahoma border. Shipments to Kansas City and east thereof would require an out of line haul via Wichita and a substantial back haul via Liberal.

Storage facilities are available at Pueblo for the storage of perishables, including potatoes, onions, apples, pears, frozen poultry, frozen foods, butter and eggs. Joint through rates are applicable from the excluded territory via Pueblo on shipments routed over the

Union Pacific to Denver and connecting lines beyond to destinations in the Southwest and to points west of the Missouri River. The route of the Rio Grande from Ogden would be used if joint through rates were available over that route to additional destinations with storage in transit at Pueblo. Storage operators at Pueblo are now handicapped, in relation to two competitors at Denver, because the through rates do not apply via Pueblo to Denver and other northern destinations where a back haul would be required on shipments routed to Pueblo via Denver, whereas the competitors can ship at the through rates in all directions, except westward. The application of the through rates via Ogden and the Rio Grande is sought so that these shippers may have available the same distribution markets as their competitors.

A shipper who deals in dried beans from Idaho and other Western States is located at Colorado Springs. His principal markets are in southeastern territory. Beans which originate in California, Colorado, and Wyoming may be stopped at Colorado Springs for cleaning and packaging and reshipped at the balance of the joint through rates. Beans which originate in Idaho may be shipped over the Union Pacific to Denver and the Rio Grande or other connections to Pueblo and reshipped therefrom at the balance of the through rates, except to points east of the Missouri River. The route of the Rio Grande from Ogden would be used on Idaho beans if it would result in the application of joint through rates to points east of the Missouri River on the same competitive basis as is now applicable when such beans are transited at points on the Union Pacific. Another bean dealer at Fruita, Colo., on the Rio Grande about 10 miles west of Grand Junction, would like to transit Idaho beans

on the same competitive basis as is applicable at Union Pacific points. This dealer is now engaged primarily in buying pinto beans from growers in the vicinity of Fruita and shipping them in carload lots to others, including the shipper at Colorado Springs. These dealers in dried beans are in competition with like dealers at points on the Union Pacific who have the benefit of transit at the through rates to destinations, among others, east of the Missouri River.

A company which is engaged in the purchase and sale of dried beans and peas maintains plants in Nebraska at Morrill on the Burlington and at Gering on the Union Pacific. Carloads of dried beans and peas originating in California, Utah, Oregon, Washington, Idaho, Colorado, Wyoming, Montana, and Nebraska are shipped to Morrill and Gering where they are cleaned, sorted, and packaged, and reshipped generally eastward and to Oklahoma and Texas. This company can obtain Idaho beans and reship them from Gering to eastern and southern destinations at the joint through rates. It was stated, however, that a substantial amount of pinto beans (about 6,000,000 pounds per year) are obtained from Colorado, mostly on the Rio Grande, on which an out-of-line charge of 7 cents per 100 pounds is applicable in addition to the joint through rates over direct routes when such beans are processed at Gering and reshipped to the Missouri River and points east thereof; also that when such beans are processed at Gering and reshipped to destinations west of the Missouri River, combinations of rates to and from Gering are applicable.

The Utah Growers' Cooperative operates throughout Utah in the production and shipment of vegetables.

including potatoes and onions. It has two branches on the Union Pacific and three on the Rio Grande in Utah, the latter at Midvale, American Fork, and Springville, all south of Salt Lake City. These three points are served by the Union Pacific and the Rio Grande, but track connections exist only at Midvale. Shipments of box shooks and of seed potatoes from Idaho and of fertilizer from Montana may move into American Fork and Springville over the Union Pacific at lower rates than when they are interchanged with the Rio Grande at Ogden or Salt Lake City, but when they are received over the Union Pacific they must be trucked to the plants on the Rio Grande. The differences in the rates are not shown.

Various flour mills at southern Kansas points, such as Moundridge and Wichita, support the complaint because they cannot at present purchase wheat at points on the Union Pacific in Idaho, Oregon, and Washington, mill it in transit, and reship to the Missouri River and points east thereof at the same rates that are applicable when similar wheat is milled at points on the Union Pacific. A specific instance was shown where nine carloads of wheat moved from Ogden to Moundridge on which the Ogden shipper applied in-bound transit billing on wheat originating at Idaho Falls. The shipments moved from Ogden over the Union Pacific to Denver, the Rio Grande to Pueblo, and the Missouri Pacific beyond. Moundridge is a local point on a branch line of the latter carrier north of Eldorado, Kans. After the wheat was milled at Moundridge the in-bound billing thereon was applied against an out-bound movement of flour to New Cumberland, Pa. The rate on flour from Idaho Falls to New Cumberland over the route of movement through Denver and Moundridge was $1.335, or 12.5 cents higher than the

rate would have been if the same wheat had been milled at a point on the Union Pacific. The distances over the route of movement through Denver and Moundridge and the more direct route of the Union Pacific are not shown.

The rate restrictions complained of by shippers of and dealers in fresh fruits and vegetables, dried beans, frozen poultry, frozen foods, butter, and eggs from the excluded territory to Colorado common points and east thereof have placed these shippers and dealers at a serious disadvantage in marketing their products, as compared with competing shippers and dealers located on the Union Pacific and having the benefit of the lower joint through rates from and to the same points. Some of these restrictions complained of, such as those by operators of flour mills in southern Kansas, could be remedied by the establishment of additional joint through rates from the excluded territory over routes of the Union Pacific to Denver and connecting lines beyond. From McCammon and points north thereof such routes would in all instances be shorter than the routes over the Union Pacific to Ogden, the Rio Grande to Denver or Pueblo, and connecting lines beyond. The Union Pacific states that it has not been requested to establish additional joint through rates via Denver. Its position with respect thereto is that the rates on agricultural commodities are on a low basis and, therefore, the carriers should be permitted to limit their application to more direct routes, thereby maintaining their long hauls and preventing undue circuity. For example, it believes that if competitive joint through rates were established on grain for milling at Wichita and other southern Kansas points and reshipment beyond to the Missouri River and east, other and longer routes probably would be demanded on the

same basis at points in Oklahoma and Texas where competing mills are located.

The establishment of additional routes and rates by way of the Union Pacific, however, would not remedy the disadvantage complained of by the shippers of and dealers in these products in the excluded territory who are compelled to pay combination rates on shipments diverted or reconsigned at intermediate points on the Rio Grande, including those stored at Pueblo or Colorado Springs on that road, and reshipped to Colorado common points and east thereof. The only effective remedy in those instances would appear to be the establishment of through rates, the same as those over the Union Pacific routes, over Rio Grande routes via Ogden or Salt Lake City.

Lumber.—A number of lumber dealers and lumber mills are located at Grand Junction and other points, and a wood-treatment or preserving plant is located at Salida, Colo., all on the Rio Grande. Generally, the complaints of these parties relate to their inability to ship lumber and millwork from the excluded territory on competitive joint rates via Ogden and the Rio Grande with stoppage in transit for partial unloading, storage, milling, or treatment and reshipment beyond to Colorado common points and east thereof at the balance of the joint rates. Mention also was made of a handicap in diverting or reconsigning at the joint rates to such points carloads originally shipped to local stations on the Rio Grande via Ogden. As previously indicated, joint through rates apply on lumber and mill work from points in California and in Oregon and Washington west of the excluded territory, including areas around Seattle, Tacoma, and Portland, over the Southern Pacific or the Western Pacific and the Rio Grande through the Utah gateways to points

on the Rio Grande and east thereof, with storage, milling, and treatment under transit arrangements. Lumber may be shipped at joint through rates from the excluded territory when the final destinations are local points on the Rio Grande, but such rates are not applicable from that territory over the Union Pacific to Ogden and the Rio Grande when the final destinations are Colorado common points or points east thereof, whether the shipments move direct or are stopped for milling or other transit purposes.

A lumber company with a wholesale yard, a box factory, a mill, and a storage and drying yard is located at Grand Junction. This company buys most of its lumber, both rough and dressed, and plywood and doors at points west of the excluded territory and sells in Colorado and points east and south thereof. This company also has a financial interest in a wholesale lumber company at Colorado Springs. It has purchased some lumber at points in the excluded territory, such as Cascade and Winchester, Idaho, Burns, Oreg., and Metaline Falls, Wash. Lumber shipped from Cascade, Winchester, and other points in the excluded territory over the Union Pacific to Ogden and the Rio Grande to Grand Junction could not be stored in transit at the latter point and later reshipped to Colorado common points or points east thereof at the joint through rates as those rates apply only over the Union Pacific routes.

Another lumber company on the Rio Grande at Military Junction, Colo., about 10 miles south of Denver, purchases lumber in California and Oregon; also a small amount in Washington, for milling in transit and reshipment beyond. Lumber from the excluded territory can now be milled in transit at Military Junction and re-

shipped to Colorado points south thereof and to points in the Southwest at the joint through rates to final destination, but this is not true to other destinations east of the Rocky Mountains. Military Junction is about 1 mile outside of the Rio Grande's switching limits at Denver.

The wood-treatment plant at Salida purchases some lumber, poles, piling, and cross ties in Colorado, Utah, and New Mexico but most is obtained from points in Oregon and Washington west of the excluded territory. This plant has a contract for treating cross ties for the Rio Grande, but about 60 percent of the forest products which it treats are reshipped to points outside of Colorado. It has not purchased products in the excluded territory, but probably would do so if the joint through rates to eastern and southern destinations were made applicable over the Union Pacific to Ogden and the Rio Grande through Salida. The company which owns the plant at Salida has a similar plant at Denver and 22 others scattered throughout the country. The plant at Denver can perform treatment in transit at the joint through rates from the excluded territory to final destinations in the East, South, and Southwest, and apparently joint through rates apply on about 40 percent of the business at Salida which does not move outside of Colorado.

Opposition Testimony

The Union Pacific operates about 9,724 miles of railroad serving over 1,700 points in 13 States.[7] It reaches the Pacific coast at Seattle, Portland, and Los Angeles, and the Missouri River at Council Bluffs, Iowa, and Kansas City. Its line between Pocatello and North Platte,

7 Iowa, Nebraska, Wyoming, Idaho, Oregon, Washington, Missouri, Kansas, Colorado, Montana, Utah, New Mexico and California.

Nebr., the point of divergence of traffic via Council Bluffs and Kansas City, runs through a substantial portion of the territory principally involved in this proceeding. It has over $600 million invested in the routes concerned. Its present facilities are adequate to move over its own direct routes the present volume of traffic and any additional volume that may be anticipated in the foreseeable future.

Evidence of the amounts expended by the Union Pacific for improvements in line, heavier tracks, yard facilities, traffic control, and other facilities, and as to its capacity and efficiency in operation, shows that the railroad has surplus capacity, is efficiently operated, and furnishes good service to shippers over its line.

The maximum elevation on the Union Pacific route between Pocatello and Cheyenne is 8,013 feet at Sherman, Wyo., for 1 mile, as compared with the maximum elevation of 9,239 feet between Ogden and Denver on the line of the Rio Grande, which operates at an elevation of 8,000 feet or more for about 35 miles. East-bound on the Union Pacific the maximum grade at any point is 1.52 percent and west-bound 1.55 percent. The Rio Grande's maximum grade is 2 percent over substantial mileage. There is much greater curvature in the Rio Grande line than in that of the Union Pacific. The total rise and fall in feet on the Rio Grande is 66.3 percent greater than that of the Union Pacific. Other data as to the physical characteristics of the two lines show that the Rio Grande line is less favorably situated than that of the Union Pacific. Traffic routed over the Rio Grande as a bridge line would require at least 24 hours additional time in transit than when routed over the Union Pacific, and would require one or two more terminal-yard services.

The Union Pacific objects to the establishment of joint through rates to points beyond Denver or Pueblo via Salt Lake City or Ogden over the Rio Grande upon the principal grounds that such routes would short haul the Union Pacific and that the diversion of traffic over such route from the Union Pacific routes now available would curtail the service and growth of the Union Pacific in the teritories it alone serves and in which it pioneered in railroad construction. Such diversion, it fears, would adversely affect the operation of its numerous branch lines in Idaho, Montana, Oregon, and Washington, which are feeders for its main line and are not self-sustaining. In those States the Union Pacific operates a total of 5,606 miles of railroad, with 2,913 miles of branch lines upon which about 46 percent of the total traffic in that territory originates or terminates. It contends that unless it has a substantial main-line haul on branch-line traffic, the operation of many, if not most, of such branches would not long be justified.

Another objection is that yard facilities of the Ogden Union Railway and Depot Company, referred to as the Depot Company, jointly owned by the Southern Pacific and the Union Pacific, at Ogden terminal are inadequate to interchange any additional volume of traffic with the Rio Grande that may be routed to or from the northwest area through Ogden, and that expansion of facilities there is not possible. Several instances of delays to trains, particularly in the fall when traffic is heavy, are shown. The record describes in detail the yard and track lay-out at this terminal and interchange point. At present the Union Pacific finds it necessary to bypass the Ogden terminal as much as possible by taking its trains for Pocatello, Salt Lake City, or Green River over an outside wye

track which avoids the terminal proper. In addition to these deficiencies, icing facilities now maintained at Ogden for east-bound and west-bound traffic are not considered adequate for icing perishable commodities from Idaho and the Pacific Northwest for delivery to the Rio Grande. The Depot Company estimated that the cost of interchanging cars between the Rio Grande and the Union Pacific and Southern Pacific is at least twice the average cost of cars in the terminal because of the additional handling required.

The largest volume of traffic was moved through the Ogden terminal in the war year 1945, when a total of 2,847,277 cars were handled. In July, the peak month in that year, the total was 284,711 cars in 2,966 trains, an average of 96 trains daily, which required an average of 70 switching shifts a day. Of that number in July, 894 were solid trains that moved through the terminal without switching. The handling of such a large volume caused considerable congestion and delays to trains. In 1949 the total number of cars handled was 1,955,219. In the peak month of that year, 2,359 trains were handled, an average of 76 trains per day, requiring about 59 switching shifts daily. These figures show that 892,058 fewer cars were handled in 1949 than in the peak year of 1945.

To show that the Union Pacific cannot afford to lose any part of its haul on traffic, attention is directed to the large deficits which the Union Pacific incurred in its passenger service. In 1948 that deficit amounted to $28,462,000, equivalent to $4,291 per mile of road operated, as compared with a passenger deficit incurred by the Rio Grande of $4,954,000, equivalent to $3,127 per mile of road. In the last 20 years the Union Pacific in only 6 years, principally in the war years, has had railway

operating income sufficient to pay fixed charges plus declared dividends, and in 1949 it had a net railway operating income of $21,707,437, which was not sufficient by $10,269,865 to pay declared dividends and interest on funded debt. That is contrasted with the results on the Rio Grande, which in 1948 had a net railway operating income of $12,156,284, out of which it provided for all fixed charges, paid a declared dividend, provided for sinking-fund requirements, and had left for its surplus account $5,167,148.

The Wabash and the Chicago & North Western, important eastern connections of the Union Pacific, furnished estimates of the possible loss of traffic to those roads, and its effect upon train service and employment on their lines in the event that the volume of traffic embraced in the Rio Grande estimate of potential traffic were diverted over the Rio Grande route.

The Wabash in 1948 participated in 9.07 percent of the total traffic handled by the Union Pacific from the Northwest and about one-half of that on west-bound traffic to that area. It estimates the value to it of the potential traffic which it might lose at $1,602,000.

The revenue derived by the Chicago & North Western from the traffic to and from the northwest territory handled in connection with the Union Pacific in 1948 was about $4,000,000. Based on the loss of the potential traffic as estimated by the Rio Grande, it urges that it will lose that amount of revenue if the joint through rates sought in this proceeding are established.

The Great Northern, Northern Pacific, Santa Fe, and Milwaukee oppose granting the Rio Grande's re-

quest for the establishment of competitive joint through rates via Ogden. Neither of these defendants, except the Santa Fe, connects with the Rio Grande. They participate, however, in joint rates with the Union Pacific on traffic between the northwest area and eastern points, but there are numerous exceptions. For example, from origins on the Great Northern joint rates are not applicable via Spokane and the Union Pacific on wool, livestock, ores, concentrates, or smelter products, and the joint rates east-bound on fruits and vegetables over that route are limited to destinations reached by the Union Pacific. These restrictions became effective on September 15, 1932, although they were protested by various shipping interests. On lumber from origins on the Great Northern, joint rates apply over that line to Spokane and the Union Pacific only when the traffic is destined to points on and west of the Missouri River, Council Bluffs to Kansas City, thence the line of The Kansas City Southern Railway Company to the Gulf of Mexico. Reference is made also to *Transcontinental Traffic Routed via Bieber, Calif.*, 213 I. C. C. 487, wherein the Great Northern was permitted to cancel joint rates via Bieber and Salt Lake City on transcontinental traffic originating at or destined to various points on the Great Northern in Idaho and Washington.

The Milwaukee, the Santa Fe, and the Wabash, in a joint brief, contend, as does the Great Northern, that upon the evidence submitted the establishment of joint rates which would short haul the defendants is not warranted.

A large number of shippers and representatives of communities served by the Union Pacific, and traffic asso-

ciations, opposed the complaint. These were from localities in Washington, Oregon, Idaho, Montana, Wyoming, Utah, Colorado, Nebraska, and Kansas. They were joined in their opposition by the public utilities commissions of those States, except Idaho, Utah, and Colorado. Those three supported the complaint in whole or in part, and as indicated, the Kansas commission later qualified its opposition by supporting the position of the complainant insofar as it pertains to wheat and livestock.

It is not practicable to deal with all of this evidence in detail, but the testimony and position of the parties have been considered. Most of the shippers in opposition to the complaint commented upon the adequacy, efficiency, and satisfactory character of the service which they had received over the Union Pacific routes. Many of them testified that they had never experienced any difficulty in marketing their products by reason of the lack of competitive joint through rates over the Rio Grande, and would not use that carrier in any event. Most of the opposition arises from the assumed effects of the diversion from the Union Pacific of the full amount, or a very large portion, of the traffic estimated by the Rio Grande as the potential traffic that would be subject to solicitation by that carrier for movement over its lines if the joint rates sought should be established. Upon the assumption that the Union Pacific would lose its long haul on the full estimated potential traffic of 101,476 carloads originated and 56,286 carloads terminated annually on the Union Pacific in the four Northwestern States, a total of 157,762, that number was used as a base by the Union Pacific to determine possible revenue losses. These were computed as amounting, in the aggregate, to $49,880,000 yearly.

Diversion of traffic with such a large loss in revenue would result, according to Union Pacific estimates, in (*a*) the discontinuance of four trains daily east-bound and four trains daily west-bound between Pocatello and North Platte; (*b*) three trains east-bound and three west-bound daily between North Platte and Council Bluffs; and (*c*) one train east-bound and one west-bound daily between North Platte and Kansas City. Extending this loss to show the direct effect upon employment, it was calculated that 1,240 employees, with annual payroll earnings of $5,000,000 yearly, would be laid off, with additional losses in employment by employees in other departments, bringing the total to about 5,300. Other losses are calculated, such as loss of employment of Union Pacific employees engaged in moving fuel coal from the company's mines in Wyoming. Based on these assumptions, derivative losses were computed by communities and localities on the Union Pacific's line whose local industries and merchants depend more or less upon the wages paid to railroad employees.

Considerable evidence of the same general character was submitted by representatives of employees of the Union Pacific, to show the effect upon them if all of the potential traffic were routed via Ogden and the Rio Grande. The number of employees that might be laid off was computed as 5,144, with a total loss of wages of $21,080,400. Losses by reason of possible loss of homes due to forced changes in places of employment, decline in real-estate values, and other contingent losses were calculated. Similar figures for possible loss of employment were calculated for certain lines connecting with the Union Pacific, such as the Wabash, the Chicago & North Western, and the Milwaukee.

The record contains detailed computations and estimates upon all of these matters. Employee representatives contend that if joint rates are required to be established we must determine what would be the probable extent of diversion of traffic from one or more routes to the route via Ogden and the Rio Grande. Based on such a finding, they further contend that we must determine the probable adverse effects of the diversion on employees of the railroads affected and impose measures to compensate or to protect such employees from loss, as conditions upon the establishment of the joint rates and through routes.

There is no specific provision in section 15 (3) or (4) requiring that such conditions be imposed, but it is argued that in finding joint rates and through routes necessary and desirable in the public interest, as required by section 15 (3), the interests of employees must be considered as they are in proceedings involving consolidations, mergers, and abandonments. Reference is made to the decision in *Cancelation of Rates and Routes via Short Lines*, 245 I. C. C. 183. In that proceeding certain carriers sought to cancel their joint rates over through routes with specified short lines. It was found that cancellation of the rates and routes would result in abandonment of the short lines with resulting inconvenience and loss to shippers and to carrier employees. Permission to cancel certain of the routes was denied.

Upon the record before us it is impossible to find definitely, or to estimate with any degree of accuracy, how much traffic might be diverted to the Rio Grande if all of the rates sought were to be made applicable over that carrier, nor how much traffic will be diverted to the Rio Grande under the restricted findings herein made.

Shippers have a right to route their own traffic, and where traffic is not routed by the shipper, the originating carrier has the right to control the routing within certain limitations.

General Discussion and Ultimate Fact Findings

In support of its contention that the assailed rates over its line are unreasonable, the Rio Grande submitted a large number of comparisons showing the differences in such rates and the competitive joint through rates on various commodities, together with the car-mile and ton-mile revenue under the respective rates and what the revenue would be if the lower joint rates were made applicable over its line. Neither factor of the combination rates is assailed, but the aggregates of such factors are alleged to be unreasonable to the extent that they exceed the competitive joint rates.

Many of the present joint rates on the transcontinental traffic here affected are commodity rates which were established originally on particular commodities to meet water competition. Others, such as those applicable on agricultural commodities, were established from producing areas in the excluded territory to enable growers and shippers to market such commodities in eastern and midwestern territories. For these reasons, and others, the defendants contend that it would be unreasonable to require the application of the joint rates over the Rio Grande, as it would result in depleting their revenues and in wasteful transportation over circuitous routes, as well as in short hauling the defendants, especially the Union Pacific. For example the rates on potatoes to Chicago are 96 cents from Monte Vista and Greeley, Colo., and $1.14 from Idaho Falls, Idaho, a difference of 18

cents, although the distance from Idaho Falls to Chicago, 1,597 miles, is 315 miles greater than from Monte Vista and 590 miles greater than from Greeley. Computations were submitted which indicate that on a carloads of potatoes weighing 45,120 pounds from Idaho Falls to Chicago the joint rate of $1.14 would yield a net profit of $1.97 per car when moved over the Union Pacific to Omaha and the Chicago & North Western beyond, and a net loss of $62.93 per car if routed over the Union Pacific to Ogden, the Rio Grande to Denver, and the Burlington beyond, 1,809 miles. The computed costs were based on general cost scales compiled by our Bureau of Accounts and Cost Finding and were not based on studies of particular movements of traffic over the respective routes. Many other examples of this nature were submitted.

With unimportant exceptions, the only rates of record with which comparison is made by or in behalf of the complainant are the joint rates in effect over routes embracing the lines of the Union Pacific which are sought for application over the lines of the Rio Grande and the Union Pacific via Ogden or Salt Lake City. As above indicated, many of those rates are the result of competition. However, they are the going rates on this traffic and, except for authorized general increases therein, have been in effect for many years. There is no claim that any of those rates is below a minimum reasonable level. It follows that the joint rates sought, as presently applied, are within the zone of reasonableness and must be regarded as reasonable rates.

With respect to the issue under section 15, the facts before us here are in some respects similar to those con-

sidered in *United States v. Union Pac. R. Co.*, 28 I. C. C. 518, and *Western Pac. R. Co. v. Northwestern Pac. R. Co.*, 191 I. C. C. 127, in both of which the complaints were dismissed. In the first, the complainant sought through routes and joint rates over the Rio Grande, among others, in connection with the Santa Fe at Pueblo or Denver on the east and the Oregon Short Line at Salt Lake City or Ogden on the west, on traffic moving between Chicago and certain Mississippi and Missouri River points, on the one hand, and stations on the Oregon Short Line, on the other. The joint rates sought were the same as those then in effect over generally shorter routes of the Union Pacific and other defendants. The short-hauling provision of the statute was held to be a bar to the establishment of the routes and rates sought.

In the second proceeding, the Western Pacific alleged that the failure of the defendants to join with it in the establishment and maintenance of joint rates between points in California on the Northwestern Pacific Railroad Company, controlled by the Southern Pacific, on the one hand, and eastern defined groups, on the other hand, over routes in which the Western Pacific would be an intermediate participating carrier, was discriminatory and prejudicial, and that the combination rates between such points over such routes were unreasonable. Therein, division 2 said, at pages 136 and 137:

> In requesting the application of the joint rates over its line complainant is not here as a shipper or receiver of traffic but solely as a carrier seeking to participate in traffic which, under the act, belongs, in the absence of emergency, to the Northwestern Pacific and Southern Pacific.

The instant complainant likewise is not here as a shipper or receiver of traffic but solely as a carrier seeking to participate in traffic on which the Union Pacific refuses to relinquish its long haul. In that proceeding, the distance over the Southern Pacific route to Ogden was about 200 miles shorter than the route sought, which is substantially the extent to which the Union Pacific route is shorter than the route sought by the Rio Grande to and from points between which most of the traffic here concerned moves. Again, the short-hauling provision was held to be a bar to the relief sought.

Since the two decisions last above referred to, section 15 (4) has been amended (in 1940), so that now the prohibition against short hauling is subject, not only to the exception that such inclusion of lines must not make the through route unreasonably long as compared with another practicable through route which could otherwise be established, but to the additional exception that the short-hauling provision may be disregarded where the "through route proposed to be established is needed in order to provide adequate, and more efficient or more economic transportation." Thus, where as here we are asked to disregard the short-hauling provision, we must give consideration, first, to the adequacy of the transportation, and second, to the efficiency and economy of the transportation. In *Pennsylvania R. Co. v. United States*, 323 U. S. 588, which affirmed the judgment of a lower court sustaining an order of division 2 in *D. A. Stickell & Sons, Inc. v. Alton R. Co., supra*, the Supreme Court said that the expressions "more efficient or more economic" transportation, as used in section 15 (4), "may well embrace both shippers' and carriers' interests," * * that both interests should be considered and a fair balance found."

These latter considerations are not determinative, however, unless the existing routes can be found not to provide "adequate" transportation.

In the proceeding just mentioned, the Supreme Court said that adequacy of transportation relates only to the interest of the shipping public, whereas, as above stated, efficient and economic transportation embraces both shipper and carrier interests.

There is no contention here by complainant that the present routes of the defendants are not adequate for the traffic hauled, and no finding is sought by complainant to that effect. The absence of such a request may well be due to complainant's contention, not sustained herein except as to sheep and goats to points on the Missouri River and east thereof, that through routes via Ogden and the Rio Grande already exist within the meaning of section 15 (3) of the act. Testimony on behalf of shippers, however, does raise a question as to the need for more adequate and economic service than afforded by existing routes with respect to some commodities.

In order properly to evaluate the testimony of shippers it is necessary to consider the nature, extent, and functioning of our intricate and far-flung commodity marketing system. The growth of our population and the development of the country have required a constantly expanding flow of diverse commodities. Great consuming areas in many instances are far distant from the points of production of the necessities of every-day life, particularly articles of food. Movements of transcontinental proportions are involved in important instances. That is true here. A complex but efficient marketing system has been evolved to provide as orderly a distribu-

tion of food commodities as possible. Adequate transportation facilities and services are required for the proper functioning of the system. Because of their generally perishable nature, food articles, such as fresh fruits and vegetables, frozen poultry, frozen foods, butter, eggs, ordinary livestock, and dried beans, must be moved to market with expedition and care, and over as many routes as possible. This requires that many routes be open in order that unnecessary interruptions of the free flow of such commodities may be avoided and that as much flexibility as possible in the distribution process be permitted. A number of services, not only at origin and destination, but en route, which are not usually required in the movement of ordinary traffic, must be provided for these perishable and semiperishable commodities. *Southeastern Vegetable Case*, 200 I. C. C. 273, and *Routing Lumber and Fruits, South to C. F. A. Territory*, 256 I. C. C. 223.

While the through service over defendants' routes, in general, is as satisfactory to the shipping public as the service which could be provided over routes including the Rio Grande, via Ogden or Salt Lake City, this is not true with respect to the commodities we have enumerated. The shippers in the originating area involved in this complaint with respect to these commodities are debarred from effective participation in the widespread system developed for the marketing of such commodities. This conclusion is also supported and emphasized by the situation with respect to the operation of many of the in-transit privileges and services which are generally accorded such traffic and are necessary for its efficient marketing. For instance, on this traffic reconsigned or accorded transit privileges, such as stopoff for partial unloading, storing,

or processing in transit, or for feeding or grazing livestock in transit, at points on the Rio Grande, the Union Pacific routes and the joint rates which apply over them are not available, and higher rates apply. On such traffic the defendants' routes are inadequate and less economical than are the Rio Grande routes.

In addition to the above-mentioned commodities, we are of the opinion that a special need for joint routes and joint rates on granite and marble monuments, in carloads, from origins in Georgia and Vermont to destinations in the excluded area, has been established.

The situation as to the commodities above named, as to which the defendants' routes are inadequate, is largely similar to that considered in *D. A. Stickell & Sons, Inc. v. Alton R. Co., supra.* There is one point of difference. There, the operating conditions, mile for mile, on the respective routes were substantially similar. Here, as indicated previously herein, the operating conditions on the Rio Grande are more onerous than those on the lines of the Union Pacific or any of the other transcontinental defendants herein. This fact was recognized by the Commission in prior proceedings. See *Livestock, Western District Rates, supra,* and *W. H. Bintz Co. v. Abilene & S. Ry. Co.*, 216 I. C. C. 481, 486. There is before us no data from which the exact differences in costs over the Union Pacific routes and the Rio Grande routes can be determined. Several estimates were made by witnesses for both the Rio Grande and the defendants, but the estimates vary so widely and are so obviously incomplete as to be practically useless. The record is sufficiently complete, however, to enable us to make a rough approximation of the differences in the operating con-

ditions and to appraise the weight which should be given to those differences, as well as to the differences in the distances over the respective routes, in determining the issues before us.

The differences in the distances between the Union Pacific routes through Wyoming, on the one hand, and the Rio Grande routes sought, on the other, using Boise, Idaho, as a representative point in the excluded territory, vary approximately from 95 miles or 11 percent to Denver, short-route distance 880 miles; 200 miles or 14 percent to Kansas City, 1,410 miles; 211 miles or 8 percent to New York, N. Y., 2,691 miles; 200 miles or 9 percent to Atlanta, Ga., 2,289 miles, to 33 or 35 miles, or 2 percent, to New Orleans, and to Fort Worth and other points in the Southwest, with short-route distances varying from 1,612 miles at Oklahoma City to 2,282 miles at New Orleans. From most of the excluded territory to western trunk-line destinations north of the route of the Union Pacific and Chicago & North Western between Omaha and Chicago, and in the Dakotas, the short routes are in connection with the Northern Pacific, Great Northern, or Milwaukee, and to such destinations the Rio Grande routes sought via Ogden are longer generally by at least 33 percent, and range up to more than 50 percent, than the short routes. From many points in the excluded territory to points in Colorado east of and including the common points, Kansas west of points on the Missouri River, and Nebraska, except Omaha, the short-route distances are less than 1,000 miles. We are of the view that the differences in transportation conditions, by which is meant operating conditions and lengths of hauls, over the Union Pacific routes and over the Rio Grande routes via the Ogden gateway are substantial for hauls

between the excluded territory, on the one hand, and ponts in Colorado east of and including the common points, Kansas west of points on the Missouri River, Nebraska, except Omaha, the Dakotas, Minnesota, Wisconsin, and Iowa and Illinois north of points on the route of the Union Pacific and the Chicago & North Western extending between Omaha and Chicago, on the other hand, but that for hauls between points in the excluded territory and points in the United States east and south of the points and territory above described, the differences in the transportation conditions are, in general spread over hauls of such great lengths that, considered as a whole, they become relatively insignificant. Thus, over these respective routes from and to the latter points the transportation conditions are substantially similar.

As pointed out, the evidence shows a substantial disadvantage or handicap on the part of shippers or receivers of monuments westbound, and ordinary livestock, fresh fruits and vegetables, dried beans, frozen poultry, frozen foods, butter, and eggs eastbound, who reconsign such shipments or take advantage of transit arrangements at intermediate points on the Rio Grande, as compared with the lower rates, together with similar reconsignment and transit privileges, enjoyed by their competitors located on the Union Pacific routes, and constitutes adequate support for a finding of undue prejudice and preference under section 3 (1) of the act.

As before indicated, on a number of commodities, from and to points in northern Idaho and in Oregon and Washington to and from points in southwestern, southern, and official territories, the defendants, particularly the Union Pacific, short haul themselves by maintaining joint rates the same as those in effect over the routes of

the Union Pacific and its connections through Wyoming, over routes which fail to give to the Union Pacific, or one or more of its connections here defendant, its long haul, while refusing to apply the same joint rates over routes in connection with the Rio Grande via the Ogden gateway. Such routes by which the Union Pacific and certain of its connections short haul themselves are generally about as long as, and in many instances substantially longer than, the Rio Grande routes here sought, and the hauls of the Union Pacific, as well as of certain of the other defendants, are shorter over such established routes than over routes in connection with the Rio Grande via Ogden.

There is upon this record, however, no substantial evidence as to the transportation conditions over the established routes referred to. A finding of discrimination under section 3 (4) of the act must be supported by a showing that the transportation conditions are no less favorable over the routes alleged to be discriminated against than the over routes said to be preferred. No such a showing has here been made.

The situation is different with respect to traffic between Utah common points, on the one hand, and the northwest area, on the other. On such traffic the Union Pacific interchanges with the Bamberger Railroad Company at Ogden at joint through rates to and from points on that line, including Salt Lake City. There is no apparent reason why similar arrangements should not apply on like traffic interchanged with the Rio Grande. The Bamberger operates, for about 36 miles between Ogden and Salt Lake City, and it appears that there is no important dissimilarity between the transportation conditions in connection with the Bamberger and those in connection with the Rio Grande.

The evidence is convincing that the joint rates sought, which now apply over the Union Pacific routes, would be reasonable for application also over the Rio Grande routes via the Ogden gateway on the traffic, and from and to the points, embraced within the findings of unlawfulness herein made.

The testimony dealing with the terminal facilities at Ogden has been carefully considered. We are persuaded that the additional traffic over the Rio Grande routes which will result under the findings herein made can be interchanged at that point or at Salt Lake City by the use of the present facilities and without serious detriment to the operating efficiency of the railroads concerned.

Conclusions

We conclude:

1. That it is necessary and desirable in the public interest, in order to provide adequate and more economic transportation, that through routes, and joint rates over such routes the same as apply over the Union Pacific and its connecting lines, defendants herein, be established via Ogden or Salt Lake City, in connection with the Rio Grande, on granite and marble monuments, in carloads, from origins in Vermont and Georgia to destinations in the excluded territory in the northwest area, as previously described herein, and on ordinary livestock, fresh fruits and vegetables, dried beans, frozen poultry, frozen foods, butter, and eggs, in carloads, from origins in the excluded territory to destinations in the United States south and east of a line drawn along the southern boundary of Kansas, thence the eastern boundary of Kansas to but not including Kansas City, thence immediately west of points on the Missouri River from Kansas City, Kans.

to Omaha, thence immediately north of points on the route of the Union Pacific and the Chicago & North Western from Omaha to Chicago, including destinations in the Lower Peninsula of Michigan and in Oklahoma and Texas.

2. That the assailed rates on the commodities and from and to the points described in the foregoing finding are and for the future will be unjust and unreasonable, and unduly prejudicial of shippers and receivers using, or desiring to use, the Rio Grande routes and unduly preferential of shippers and receivers using the Union Pacific routes, in and to the extent that they exceed or may exceed the joint rates maintained on such commodities from and to the same points over the Union Pacific routes.

3. That the maintenance by the Union Pacific and other defendants of joint rates between points in the northwest area, on the one hand, and points on the Bamberger Railroad south of Ogden, on the other hand, while refusing to participate in like rates to and from the same points on the Rio Grande south of Ogden, subjects the Rio Grande to discrimination in violation of section 3 (4) of the act.

4. That except as indicated in the preceding findings, the allegations made in the complaint are not sustained.

An appropriate order will be entered.

LEE, *Commissioner*, concurring in part:

I concur in the conclusions of the majority that joint [illegible] me as apply over the Union [illegible] and [illegible]

connecting lines should be established via Ogden or Salt Lake City, in connection with the Rio Grande, on the commodities and from and to the origins and destinations specified by the majority; that the rates assailed on such commodities from and to such origins and destinations are and for the future will be unjust and unreasonable, and unduly prejudicial of shippers and receivers using, or desiring to use, the Rio Grande routes and unduly preferential of shippers and receivers using the Union Pacific routes, in and to the extent that they exceed or may exceed the joint rates maintained on such commodities from and to the same points over the Union Pacific routes; and that the maintenance by the Union Pacific and other defendants of joint rates from and to points on the Bamberger Railroad south of Ogden, while refusing to participate in like rates from and to the same points on the Rio Grande south of Ogden, subjects the Rio Grande to discrimination in violation of section (3) (4) of the act. The decision in this case will correct in part, a long-standing, unlawful rate adjustment, an adjustment which has discriminated against the industries and people of Washington, Oregon, Idaho, Montana, and Utah, the area from and to which such unlawful adjustment applies being referred to in the report as the "excluded territory." However, I am of the opinion that the action of the Commission should not be limited to a partial correction of this unlawful rate adjustment. On the facts shown in the record, the act requires that the rates on all commodities, between points in the excluded territory and Colorado common points and points east thereof, over the Rio Grande routes shall be no higher than those over the Union Pacific routes. The act contemplates that there shall be no excluded territory with respect to any commodity or persons.

Transcontinental joint rates on freight traffic were established in 1897, from and to the territory here considered, applicable over the Rio Grande routes via Ogden. These joint rates were in effect for many years, until 1906 from and to some points and until 1912 from and to other points, when they were canceled by the Union Pacific and higher combination rates became effective. However, the through routes were not closed. Numerous shippers testified that these routes are open and available and that they can route traffic over them. This testimony was not challenged or contradicted. On the contrary, a responsible traffic official of the Union Pacific testified that the Rio Grande routes are "actually available today on traffic to or from points on the Union Pacific and its connections in Utah north of Ogden, Idaho, Montana, Oregon, and Washington." That these routes are open and used is proved by evidence in the record (1) of east-bound shipments of various commodities made in 1948 from points on the Union Pacific in the excluded territory to Colorado common points, and which moved over the Rio Grande routes, including the entire length of the Rio Grande line, on through bills of lading issued by the Union Pacific, (2) of west-bound shipments of various commodities made in the same year from various eastern points to points in the so-called excluded territory, and which moved on through bills of lading over carriers east of Colorado junctions to the Rio Grande at such junctions and thence over the Rio Grande to Salt Lake City or Ogden and the Union Pacific beyond, and (3) of numerous shipments moved over the Rio Grande routes between eastern points and the excluded territory during World War II and in 1949 when the Union Pacific main line in Wyoming was blocked by snow. The year 1948, the calendar year immediately preceding the hearing, was selected as typical of the sit-

uation which prevailed in the prior years and which continued up to the time of the hearing.

I am unable to agree with the majority that the shipments referred to above must be regarded as of an isolated nature and as falling in the same category as the single shipment considered in the *Beaman Elevator case*, 155 I. C. C. 313, referred to in a footnote to the opinion of the United States Supreme Court in *Thompson v. United States*, 343 U. S. 549. In the *Beaman* case a single carload shipment of grain moved over the lines of two connecting railroads from Beaman, Iowa, via Clinton, Iowa, to St. Louis, Mo. The evidence plainly showed that the bill of lading covering this shipment was issued and recognized by these railroads through error. There was no evidence "of any like movement before or since." Adequate service was available over nine other routes. A wholly different situation is before us in this proceeding. Numerous shipments of a variety of commodities have been transported in both directions over the Rio Grande routes on through bills of lading deliberately issued and recognized by the Union Pacific and the other participating carriers. The situation here before us is similar to that considered by the Supreme Court in *Virginia Ry. v. United States*, 272 U. S. 658, also referred to in a footnote to the decision in *Thompson v. United States, supra*, in which, in referring to the route over which the Commission there prescribed reasonable and nondiscriminatory rates, the Court stated that "that route is closed commercially, because these two carriers have not established any joint rates to the West from any of these 54 mines; and the combination of the Virginian's local rate from the mines to the junction with the Chesapeake & Ohio's rates from the junction to the West, results in charges so high as to be prohibitive."

The Court held however, that even though the route was closed commercially, open through routes to the West were in existence.

In the *Thompson* case the court pointed out that "there is no evidence that any shipment has ever been made from Lenora to Omaha via the Burlington line" or that the carriers have ever offered through service over the Missouri Pacific-Burlington route. Thus, the facts before the Court in that case likewise were wholly different from those before us in this proceeding. I think that the Court's opinion in that case supports the conclusion that through routes on freight traffic over the Rio Grande routes have existed for many years and now exist and that the short-hauling provision of section 15 (4) is not applicable.

If, however, the Rio Grande routes were actually closed, the short-hauling provision of section 15 (4) of the act would not be a bar to the correction in full of the present discriminatory rate adjustment. The discrimination in violation of section 3 of the act, shown by the evidence, makes that provision of section 15 (4) inapplicable. In any event, the Rio Grande routes are shown to be needed in order to provide adequate, and more efficient and more economic transportation, and, if they were not already open through routes, we could and should require that they be opened.

As stated in the report of the majority, the evidence shows a substantial disadvantage or handicap on the part of shippers or receivers of monuments, livestock, fresh fruits and vegetables, dried beans, frozen poultry, frozen foods, butter and eggs, who reconsign shipments or take advantage of transit arrangements at intermediate points

on the Rio Grande, as compared with the lower rates, together with similar reconsignment and transit privileges enjoyed by their competitors located on the Union Pacific. The evidence is equally impressive with respect to the disadvantage or handicap to shippers or receivers of lumber, building materials, farm machinery, and other commodities. For instance, the lumber company at Military Junction, Colo., referred to in the majority report, is handicapped in its efforts to compete with mills at Denver and Kansas City because it cannot obtain lumber from the excluded territory for milling in transit on the same basis as these competing mills. A representative of that company testified that it would purchase several million feet of lumber annually from points in the excluded territory if it had available reasonable and nonprejudicial joint rates over the Rio Grande routes. By reason of the rate situation complained of, the lumber dealer at Grand Junction, Colo., who is also referred to in the majority report, has lost business to competitors who have the benefit of transit at the joint rates applicable over the Union Pacific routes. This evidence is only typical; it was presented as representative of the prevailing situation.

Shippers and receivers of freight at points in eastern Oregon and southern Idaho, on the line of the Union Pacific, have been, and are, excluded from additional markets that would be available to them if reasonable and nonprejudicial joint rates were in effect over the Rio Grande routes. Some of these shippers express the belief that the establishment of such joint rates would provide them with a better car supply, in that the Rio Grande would furnish additional cars to move out shipments routed over its line. It is common knowledge that better supply of cars is available to shippers who have com-

petitive routes to the consuming markets. The record clearly establishes that the present rate adjustment results in a substantial disadvantage to the industries, shippers, and receivers located in the considered territory, and in undue prejudice to them.

Likewise, the evidence establishes that the defendant railroads discriminate against the Rio Grande, in that from and to points in northern Idaho and in Oregon and Washington to and from points in southwestern, southern, and official territories, the defendants, particularly the Union Pacific, short haul themselves by maintaining joint rates, the same as those in effect over the routes of the Union Pacific and its connections through Wyoming, over routes which fail to give to the Union Pacific, or one or more of its connections, its long haul, while refusing to establish the same joint rates over the Rio Grande routes. The routes by which defendants short haul themselves are generally as long as, and in many instances substantially longer than, the Rio Grande routes, and the hauls of the Union Pacific and of other defendants are shorter over such established routes than over the Rio Grande. The evidence does not establish that transportation conditions are more favorable over these routes than over the Rio Grande routes which are discriminated against by defendants. On the contrary, the record, in my opinion, warrants finding that the transportation conditions over such routes are, in general, no more favorable than over the Rio Grande routes. The Union Pacific and the other defendants are, and for the future will be, violating section 3 (4) of the act by failing and refusing to participate in joint rates with the Rio Grande, from and to points in the excluded territory, to and from points in official, southern, and southwestern territories, while participating with each other in joint rates from

and to the same points, over routes over which the Union Pacific and other defendants short haul themselves.

The Union Pacific is a strong and progressive railroad. It is ably managed and efficiently and economically operated. Being the only railroad in southern Idaho, every shipper in that area is dependent on it for rail service. I am persuaded that, instead of being allowed to continue to maintain an "excluded territory," it should be required to provide these shippers with joint rates which will enable them to buy and sell in all markets on an equality with other shippers, and that such joint rates will not result in any substantial diversion of the traffic now moved over its lines.

The joint rates now in effect on freight traffic over the Union Pacific routes are shown by the record to be reasonable for application over the Rio Grande routes. We should require that these rates be maintained over the latter routes.

PATTERSON, *Commissioner*, concurring in part:

I concur in the relief granted to the Rio Grande and transit operators thereon who are handicapped by the lack of through routes and joint rates the same as those over the Union Pacific routes. It seems to me, however, that the findings of unlawfulness are inconsistent in that they fail to include lumber and articles taking lumber rates in the relief granted.

The showing made of a need for such through routes and joint rates, in my opinion, is more persuasive as to lumber and articles taking lumber rates than as to any of the commodities included in the foregoing findings, with the possible exception of livestock. The record shows

that at least one lumber dealer at Grand Junction, another at Military Junction, near Denver, and a wood-treatment plant at Salida, all on the Rio Grande, are handicapped in their efforts to compete with like dealers on the Union Pacific routes, and that at least the dealer at Grand Junction has lost business, by reason of the rate situation complained of, to competitors who have the benefit of transit at the joint rates over the Union Pacific routes. I believe this evidence is adequate support for the inclusion of this commodity group in the findings of unlawfulness made.

The order entered in connection with this report requires the establishment on particular commodities in connection with the Rio Grande, of through routes and joint rates the same as those now in effect over the Union Pacific routes. The formation of those through routes is appropriately left, in large measure, to the carriers. I want to make it clear that in my view, on traffic to or from the area east of the Colorado common points, where the provisions of the order so permit, these new routes should be formed in such a manner as to short haul the Union Pacific only to the extent necessary to afford the Rio Grande its line haul and avoid unduly circuitous routes.

ARPAIA, *Commissioner*, concurring:

In my opinion there are through routes over the Rio Grande and the Union Pacific via the Ogden Gateway on traffic between the territories included in this proceeding, and therefore a finding under the provisions of section 15 (4) of the Interstate Commerce Act is not required.

The evidence of record shows that these routes presently are open and available to shippers on combination

rates. The history of the relationship between these carriers leaves no doubt as to that fact.

When joint rates over these routes, which were in effect from 1897 to 1906 and 1912, were canceled by the Union Pacific, no specific cancellation was made of the through routes over which the joint rates applied. To my mind it would be necessary for the Union Pacific to have shown affirmatively that it refused traffic on through billing over the Ogden Gateway in order to negative the existence of such through routes. Instead, the record shows information elicited from an official of the Union Pacific to the effect that routes via Ogden were available subject to the application of combinations of local rates.

The question then is to what extent should we compel joint rates. Joint rates over the routes through Ogden, I believe, are warranted in the public interest only on the commodities for which relief is included in the majority report.

We should interfere in the management of a railroad only when the reasons for doing so are clear and compelling, as they are here, and only to the extent the public interest actually requires.

MAHAFFIE, *Commissioner*, dissenting in part:

I dissent from the majority report insofar as it fails to find that the existing routes to and from the northwest territory, described in the report, via the Rio Grande through the Ogden gateway are effective through routes and that the failure of the Union Pacific and other defendant railroads to establish joint rates with the Rio Grande via Ogden unjustly discriminates against that carrier. I disagree also because the report does not find that

it is necessary and desirable in the public interest that joint rates on commodities generally, in addition to those specified, should be established over such through routes.

We are not called upon in this proceeding to exercise our authority, under section 15 (4) of the Interstate Commerce Act, to establish new through routes via that gateway. Therefore, the conditions in that paragraph are not applicable. We are free to exercise our power under section 15 (3) to establish joint rates unhampered by those restrictions.

A finding that these routes are open and freely available to shippers today is fully supported by the evidence. It was acknowledged by a freight traffic official of the Union Pacific that a shipper has the right under the act (section 15 (8)), to specify such routes for the carriage of his shipments. That right, it should be noted, can be availed of only when two or more through routes and through rates are actually established and in existence.

The record shows that some joint through rates, as distinguished from combination rates, are in fact now published in a Union Pacific tariff for application through Ogden over the entire length of the Rio Grande to Denver and the Union Pacific beyond. These apply on shipments of sheep or goats originating on the Union Pacific in southern Idaho and eastern Oregon, billed to destinations on the Missouri and Mississippi Rivers and to Chicago and other points. The joint rates are higher than rates on like livestock moved over the direct route of the Union Pacific and, therefore, retard use of the Rio Grande route. But the publication of such joint rates in connection with transportation over the whole length of the Rio Grande is proof of the consent of the Union Pacific for

the use of that rail line as part of a through route at joint rates. And it was further stated by the same witness that the Union Pacific has no objection to publishing the same joint rate arrangement on shipments of cattle.

In 1941-42 mixed military trains with troops in passenger cars and military supplies in freight service were transported over this route on through billing. Four examples of such trains are described in the record. These moved from Fort Sill, Okla., and Camp Claiborne, La., to Fort Lewis, Wash., in December 1941 and February 1942. The trains were routed and moved to Colorado junctions of the Rio Grande, thence over that railroad to Ogden and the Union Pacific beyond. Unlike certain other movements to and from the northwest area via Ogden in the war period in connection with these two lines, the military trains were not routed under service orders issued by us or the Office of Defense Transportation. Arrangements for the through movements were made with the railroads and the rates charged were settled on the basis of the joint rates applicable in connection with the Union Pacific routes through Wyoming.

The existence of the route as an established through route was undoubtedly an important consideration for its use in February 1949, when the line of the Union Pacific was blocked by snow. In that emergency, freight cars, passenger cars, express and mail were promptly diverted by the Union Pacific through Denver over the Rio Grande to Salt Lake City and to Ogden for movement beyond. Of the freight cars diverted, 1,493 were for destinations in Idaho on the Union Pacific and in the northwest area.

Actual and continuous use of the Rio Grande route at through rates made by combinations of separate rate factors via Ogden to and from the Northwest without op-

position or objection by the Union Pacific or other participating railroads is amply shown by the evidence of typical movements of numerous commodities. The calendar year 1948 was used by the Rio Grande as a representative year. In that year 16 carloads of various commodities were shipped from the northwest territory over the Union Pacific to Ogden and the Rio Grande beyond to Denver, Louviers, Pueblo and Trinidad, Colo., over the entire length of the Rio Grande. They originated on the Union Pacific and moved on through bills of lading. Some of the cars were partly unloaded at Rio Grande points and then continued through to their destinations. Seventeen carloads of various commodities moved, from late in December 1947, and in the year 1948, from various eastern points on through bills of lading at through combinations of rates over rail lines east of the Colorado junctions to the Rio Grande at such junctions thence over that line to Salt Lake City or Ogden and the Union Pacific beyond. Some of the cars were stopped for partial unloading at stations on the Rio Grande or the Union Pacific.

The same kinds of movements as those exhibited in 1948 prevailed to about the same extent in years prior to 1948 and continued into 1949 at the time of the hearings.

All of this evidence clearly supports a finding that the routes are existing established through routes over which through rates apply and that the railroads participating therein consent to their use as through routes and freely hold themselves out to shippers as ready and willing to perform transportation service over them. They meet completely the requirements necessary as prerequisites for a finding that they are established through routes announced by the United States Supreme Court in

Thompson v. United States, 343 U. S. 549. In that case, the Court said "the test of the existence of a 'through route' is whether the participating carriers hold themselves out as offering through transportation service. Through carriage implies the existence of a through route whatever the form of the rates charged for the through service." However, as stated by the Court, there was no evidence that any through transportation had ever been offered from and to the points involved in the suit and, therefore, no through routes existed between those points.

The situation here is in striking contrast to that in the *Thompson* case. Here there is substantial evidence of a holding out that through transportation will be furnished and of execution of such offers by the issuance of through bills of lading and the performance of through service over many years. We cannot ignore the fact that the joint rates over these routes that were in effect from 1897 to 1906 and 1912 were canceled by the Union Pacific without canceling its participation in the same through routes thereafter at higher through combination rates. That railroad's course of conduct evidenced no more than a desire to discontinue joint rates so as to make the higher combinations applicable. Its action in canceling its participation in joint rates did not, without more, cancel its participation as a carrier in the through routes. The latter were never disestablished but continued to exist. The record taken as a whole inevitably leads to that conclusion. To find under such a state of facts that no through routes exist for commodities generally is directly contrary to the evidence.

Even if a finding that no through routes exist over this line be sustained there is substantial evidence that the rate situation results in undue prejudice and undue

disadvantage to shippers and to districts and localities in Utah and Colorado dependent upon the Rio Grande for rail service, in violation of section 3 (1) of the act. Such violation removes the restrictions imposed in section 15 (4) upon our authority to establish through routes. That undue prejudice and undue disadvantage exist is fully supported by the testimony of numerous witnesses. Briefly, the testimony shows that livestock producers in Utah and Colorado, in areas served by the Rio Grande, are not able, due to the combination through rates via Ogden, to buy on a reasonably competitive basis, cattle and sheep in Idaho, Montana, Oregon and Washington for grazing and feeding in transit on the ranges in Utah and Colorado, in competition with buyers and stock feeders in northern Colorado, Nebraska, and northern Kansas. The same undue prejudice and undue disadvantage is experienced by buyers and feeders in southeastern Colorado east of Pueblo, Colo., and in southwestern Kansas served by the Santa Fe and the Missouri Pacific railroads. Their failure to obtain joint through rates from the producing areas in the Northwest over the Union Pacific to Ogden, Rio Grande to Pueblo and its connections beyond places them at an undue disadvantage.

The record contains convincing evidence by representatives of large groups of shippers that there is undue prejudice and undue disadvantage to wool producers, as well as to livestock operators in Colorado served by the Rio Grande; also to lumber dealers and processors; dealers in farm machinery and other commodities; and to a cold storage warehouse operator in Pueblo. There is substantial evidence from producers and shippers of agricultural commodities in the Northwest, particularly in Idaho, to support findings that the refusal of the defendant railroads to join in joint through rates via Ogden

and the Rio Grande to and from points beyond the Colorado gateways of that carrier exclude them from additional markets needed for their products. All of that evidence sustains and fully supports the finding that there is a violation of section 3 (1) of the act and justifies a general finding that joint through rates via the Ogden gateway should be established on commodities generally. The findings should not be limited, as are the findings of the majority, to particular commodities as to which evidence was offered but should be broadened to include all commodities.

We are fully warranted in dealing with this situation broadly, in considering what is necessary and desirable in the public interest, with respect to joint rates over these established through routes. We are not limited to consideration of proof as to every rate on every commodity from every origin to every destination. Such a view of our authority is too narrow and is not justified by the law or the evidence.

In other types of proceedings where we found it necessary to deal generally with a comprehensive rate situation, the Supreme Court has held that we may properly make general findings upon typical evidence representative of the situation as a whole.

In exercising authority under section 13 (4) as to the lawfulness of rail rates on intrastate traffic in a State and under section 15 (6) as to divisions of joint rates of rail carriers we may make general findings when the evidence is shown in numerous and representative instances that are typical of the rate situation as a whole. Similarly we need not attempt the impracticable, if not impossible, task of examining every rate on every commodity

and class of commodities, from every origin to every destination in the large areas and territories under scrutiny here. We can adjust the remedy to the evil and make our order as broad as the discrimination and undue prejudice. *See Illinois Central R. Co. v. Public Utilities Commission*, 245 U. S. 493, 507. In *Wisconsin Railroad Comm. v. Chicago, B. & Q. R. Co.*, 257 U. S. 563, 579, a proceeding dealing with intrastate rates on a State-wide basis, the Court stated that "any rule which would require specific proof of discrimination as to each fare or rate and its effect would completely block the remedial purpose of the statute." In *Georgia Public Service Comm. v. United States*, 283 U. S. 765, 774, the Court said that "when an investigation involves shipments from and to many places under varying conditions, typical instances justify general findings." That case also arose under section 13 (4) of the act with respect to intrastate rates. There the order related to a few commodities but the rates prescribed were State-wide in operation and applied to shipments between hundreds of points of origin and destination. Under those circumstances the Court held that "To require specific evidence and separate adjudication in respect to each would be tantamount to denying the possibility of granting relief."

To the same effect is the holding of the Court in *New England Divisions Case*, 261 U. S. 184, 197. There the Court had under consideration contentions with respect to the nature of the evidence in support of our order as to divisions of joint rates between groups of rail carriers. The Court pointed out that our order was based on evidence which we assumed was "typical in character, and ample in quantity, to justify the finding made in respect to each division of each rate of every carrier." That method of proof was found to be our common practice in

adjudicating comprehensively upon substantially all rates in a large territory, and that the actual necessities of procedure and administration had led to the adoption of that method also in passing upon the reasonableness of proposed rate increases. That method was found equally appropriate in passing upon multitudes of divisions of joint rates. That it has similar application in a comprehensive case such as we have here where we are called upon to establish joint rates via a gateway through which substantially all joint rates have been refused, is equally clear. In the case cited, the Court said that there was no constitutional obstacle to the adoption of the method pursued and that only in the way could the task be performed.

The same rule should be applied in the instant case, in order to carry out effectively our authority to prescribe, in the public interest, joint rates by way of the Ogden gateway. The report of the majority finds it necessary in the public interest that joint rates via that gateway be established on particular commodities as specified in the report. The same evidence is, and should be concluded to be typical of the rate situation as a whole. In accordance with our practice in other types of comprehensive proceedings which has been found lawful and necessary under principles announced in the Supreme Court cases cited, that evidence should be found adequate to support an order that joint rates be established via that gateway on commodities generally.

I am authorized to state that COMMISSIONERS SPLAWN and CROSS join in this expression.

COMMISSIONER KNUDSON did not participate in the disposition of this proceeding.

From—	To—	Commodity	Rates [1]		Distances [2]		Revenues per car-mile			Average carload weight
			Via Union Pacific routes	Via D&RGW routes	Via Union Pacific routes	Via D&RGW routes	Via Union Pacific joint rates	Via D&RGW combination rates	Via D&RGW joint rates [3]	
			Cents	*Cents*	*Miles*	*Miles*	*Cents*	*Cents*	*Cents*	*Pounds*
Pendleton, Oreg	North Salt Lake, Utah	Cattle	58	90	342	342	37.99	58.95	37.99	22,400
Logan, Utah	Denver, Colo	do	83	111	649	679	28.65	36.62	27.38	22,400
Huntington, Oreg	Chicago, Ill	do	168	213	1,872	2,083	20.10	22.91	18.07	22,400
Idaho Falls, Idaho	Oklahoma City, Okla	Potatoes	90	128	1,428	1,462	28.44	39.50	27.78	45,120
Redmond, Oreg	Atlanta, Ga	do	163	203	2,808	3,008	26.19	30.45	24.45	45,120
Armstead, Mont	Oklahoma City, Okla	Dry beans and peas	93	203	1,550	1,584	50.89	108.70	49.80	84,820
Twin Falls, Idaho	Atlanta, Ga	do	148	187	2,172	2,372	57.80	66.87	52.92	84,820
Nampa, Idaho	Detroit, Mich	Lettuce	175	217	2,074	2,286	20.96	23.58	19.02	24,840
Hood River, Oreg	Pittsburgh, Pa	Apples	192	252	2,666	2,877	29.99	36.47	27.79	41,640
Spokane, Wash	Kansas City, Mo	Wheat	86.5	132	1,901	2,101	47.40	65.45	42.89	104,180
Pocatello, Idaho	Wichita, Kans	do	68.5	96	1,206	1,240	59.17	80.66	57.55	104,180
Spokane, Wash	Omaha, Nebr	Lumber	92	143.5	1,784	2,003	35.76	49.68	31.85	69,340
Kellogg-Wardner, Idaho	Fort Worth, Tex	do	104	143.5	2,237	2,271	32.24	43.81	31.75	69,340
Portland, Oreg	Provo, Utah	Canned goods	84	116	943	930	53.82	75.36	54.57	60,420
Do	New Orleans, La	do	143	209	2,762	2,728	31.28	46.29	31.67	60,420
St. Louis, Mo	Logan, Utah	Roofing	153	196	1,453	1,588	64.76	75.91	59.25	61,500
Chicago, Ill	Spokane, Wash	do	161	250	2,272	2,483	43.58	61.92	39.88	61,500
Geneva, Utah	Boise, Idaho	Iron and steel articles	63	78.55	447	440	109.76	139.03	111.51	77,880
Do	Portland, Oreg	do	63	78.55	928	921	52.87	66.42	53.27	77,880
Pittsburgh, Pa	do	do	167	205	2,729	2,941	47.50	54.10	44.08	77,880
Salt Lake City, Utah	Butte, Mont	Agricultural implements	141	173	433	434	98.67	120.78	98.44	30,300
Detroit, Mich	Malad, Idaho	do	295	333	1,836	1,982	49.17	51.41	45.54	30,300
Denver, Colo	Spokane, Wash	Vehicle parts	251	370	1,371	1,466	79.16	109.13	74.03	43,240
Fort Worth, Tex	Seattle, Wash	Animal and poultry feed	119	278	2,338	2,372	31.48	72.48	31.02	61,840
Denver, Colo	Butte, Mont	Tires and tubes	179	294	908	1,004	73.41	109.05	66.39	37,240
Atlanta, Ga	do	Furniture	396	596	2,318	2,518	28.63	39.67	26.36	16,760
Kansas City, Mo	Seattle, Wash	Paper	154	373	2,069	2,269	31.72	70.06	28.93	42,630
Oklahoma City, Okla	Boise, Idaho	Petroleum and petroleum products	141	188	1,612	1,645	48.09	62.83	47.13	54,960
Kanssa City, Mo	Portland, Oreg	Paint and paint material	170	364	1,891	2,091	52.84	102.32	47.79	58,780

[1] In cents per 100 pounds, in effect September 1, 1949.
[2] Over existing routes of Union Pacific and connections; and over Denver & Rio Grande Western routes.
[3] At joint rates applicable over competitive routes of Union Pacific and connections.

APPENDIX C

Order

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 12th day of January, A. D. 1953.

No. 30297

Denver & Rio Grande Western Railroad Company

v.

Union Pacific Railroad Company, et al.

This proceeding being at issue upon complaint and answers on file and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been made, and the Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof; and the Commission having found in said report (1) that through routes and joint rates on particular commodities from and to specified areas via Ogden or Salt Lake City, Utah, connection with the complainant herein, are necessary and desirable in the public interest; (2) that the assailed rates on the same commodities and from and to the same points are and will be unreasonable and unduly prejudicial and preferential; and (3) that the maintenance by the defendants of joint rates between points in the northwest area, as described in the report, on the one hand; and points on the Bamberger Railroad south of Ogden, on the other hand, while refusing to participate in like rates to and from the same points on the Rio Grande south of Ogden, subjects the Rio Grande to unlawful discrimination;

It is ordered, That the defendants named in the complaint, according as they participate in the transportation, be and they are hereby notified and required to cease and desist, on or before April 7, 1953, and thereafter to abstain (1) from publishing, demanding, or collecting for the transportation of the commodities and from and to the points named in the next succeeding paragraph hereof, rates which exceed those prescribed in said paragraph, and (2) from practicing the undue prejudice and preference, and the unlawful discrimination, referred to in the next preceding paragraph.

It is further ordered, That said defendants, and the complainant, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before April 7, 1953, upon notice to this Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, and thereafter to maintain through routes, via Ogden or Salt Lake City, Utah, in connection with the line of the complainant, for the interstate transportation, in carloads, of granite and marble monuments from origins in Vermont and Georgia to destinations in the excluded territory in the northwest area, as described in the report, and of ordinary livestock, fresh fruits and vegetables, dried beans, frozen poultry, frozen foods, butter, and eggs, in carloads, from origins in the described excluded territory to destinations in the United States south and east of a line drawn along the southern boundary of Kansas, thence the eastern boundary of Kansas to but not including Kansas City, thence immediately west of points on the Missouri River from Kansas City, Kans., to Omaha, Nebr., thence immediately north of points on the lines of

the Union Pacific Railroad Company and the Chicago and North Western Railway Company from Omaha to Chicago, Ill., including destinations in the lower peninsula of Michigan and in Oklahoma and Texas; and to apply on such traffic, over such through routes, joint rates the same as those maintained and applied on like traffic from and to the same points over routes embracing the lines of the Union Pacific Railroad Company through Wyoming.

It is further ordered, That said defendants, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before April 7, 1953, upon notice to this Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, and thereafter to maintain and apply, rates, regulations, and practices which will prevent and avoid the undue prejudice and preference, and the unlawful discrimination, referred to in the first paragraph hereof.

And it is further ordered, That this order shall continue in force until the further order of the Commission.

By the Commission.

(Seal)

GEORGE W. LAIRD,
Acting Secretary.

APPENDIX D

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA, OMAHA DIVISION

Civil Action No. 76-53

Union Pacific Railroad Company, et al.,
Plaintiffs,

v.

United States of America and Interstate Commerce Commission,
Defendants.

Messrs. Elmer B. Collins, Asst. Western General Counsel, John J. Burchell and W. R. Rouse, Of Counsel, Omaha, Nebraska, for Union Pacific Railroad Company.

Mr. F. O. Steadry, Chicago, Illinois, for Chicago and North Western Railway Company and Chicago, St. Paul, Minneapolis & Omaha Railway Company.

Mr. Carson L. Taylor, Chicago, Illinois, for Chicago, Milwaukee, St. Paul and Pacific Railroad Company.

Mr. Eugene S. Davis, St. Louis, Missouri, for Wabash Railroad Company.

Messrs. Robert E. Quirk, Washington, D. C., Harry L. Welch, Omaha, Nebraska, and Herbert M. Boyle, Denver, Colorado, for Denver & Rio Grande Western Railroad Company.

Mr. L. E. Torinus, Jr., St. Paul, Minnesota, for Great Northern Railway Company.

Mr. Bert L. Overcash, Lincoln, Nebraska (Mr. Clarence S. Beck, Attorney General of Nebraska, was on the brief) for the State of Nebraska and Nebraska State Railway Commission.

Mr. Robert L. Simpson, Olympia, Washington (Mr. Don Eastvold, Attorney General of Washington, was on the brief) for Washington Public Service Commission.

Mr. John H. Carkin, Salem, Oregon (Mr. C. W. Ferguson was with him on the brief) for Public Utilities Commission of Oregon.

Mr. John H. Risken, Helena, Montana, for Board of Railroad Commissioners of the State of Montana.

Mr. Howard B. Black, Attorney General of Wyoming, Cheyenne, Wyoming, for State Board of Equalization and Public Service Commission of Wyoming.

Mr. Justus R. Moll, Washington, D. C., and Messrs. J. D. Cranny and J. P. Moore, Omaha, Nebraska, for M. P. Caveny of Omaha, chairman of the Union Pacific General Chairmen's Association.

Mr. Ray McGrath for Idaho Farm Bureau, Public Service Commission of Utah, Committees of the Railroad Brotherhoods who work for the D&RG, and National Livestock Producers Association.

Messrs. Warren H. Ploeger and Roland J. Lehman, on the brief, Messrs. Nye F. Morehouse, M. L. Countryman, Jr., Edwin C. Matthias, J. C. Gibson, M. L. Bluhm, Joseph H. Miller, Of Counsel, for the plaintiffs.

Mr. Edward M. Reidy, Chief Counsel, and Mr. Samuel R. Howell, Asst. Chief Counsel, Of Counsel, for Interstate Commerce Commission.

Mr. Henry B. Cockrum, Acting Assoc. Solicitor, United States Department of Agriculture, Washington D. C.; Mr. Charles W. Bucy, Assoc. Solicitor, was with him on the brief for the Department of Agriculture.

Mr. E. Riggs McConnell, Special Asst. to the Attorney General, Washington, D. C.; Messrs. Stanley N. Barnes, Asst. Attorney General, James E. Kilday, Special Asst. to the Attorney General, and Donald

R. Ross, United States Attorney, were with him on the brief for the United States.

Before JOHNSEN and COLLET, Circuit Judges, and DELEHANT, District Judge.

COLLET, Circuit Judge.

The Denver and Rio Grande Western Railroad Company, hereafter referred to as the Rio Grande, filed a complaint with the Interstate Commerce Commission requesting the Commission to order the Union Pacific Railroad Company (and other lines comprising the Union Pacific System, together with connecting carriers comprising, in all, 221 railroads, which will be referred to as the Union Pacific) to file joint rates over through routes with the Rio Grande for the transportation of freight from and to certain areas. The Commission granted the request as to certain types of freight with substantial territorial limitations. The Union Pacific brings this action to enjoin and set aside the order. A reference to a map of the United States will be helpful in understanding the following summarization of the facts.

The northern terminus of the Rio Grande is Ogden, Utah. From Ogden it runs south through Salt Lake City and Provo, Utah, then southeasterly and east, entering Colorado at about the south central part of that state, thence east and somewhat north through the central part of Colorado to Dotsero, west of Denver, where it divides, one branch going on east to Denver, the other swinging south and east to Pueblo, Colorado. From Denver the Rio Grande line runs south through Colorado Springs to Pueblo and Trinidad. Other lines serve territory in southern Utah, northwestern New Mexico, and southern Colorado. These latter lines are not of special

importance in this action. At Denver, Colorado Springs, Pueblo, and Trinidad the Rio Grande maintains joint rates and through routes with lines other than the Union Pacific to destinations east and south of those points.

The Union Pacific (including connecting lines which were defendants in the I. C. C. proceedings) serves the greater part of the east, south and midwestern sections of the United States. Traffic involved in this action from those sections flowing westward over the Union Pacific and connecting lines converges at Denver and Cheyenne, Wyoming, then moves westwardly across the southern part of Wyoming to Ogden and Salt Lake City. One of its lines runs from Salt Lake City south to Provo, Utah, thence southwest to Los Angeles, California.

The Union Pacific also serves the northwestern part of the United States, including that part of Utah north of Ogden, Idaho, Montana, Oregon, and Washington. It is traffic from and to this latter territory, referred to herein as the northwest territory or area, which is the principal subject of the present controversy.

The Union Pacific maintains joint rates and through routes over its lines and with many connecting carriers from and to the northwest territory through Ogden and Salt Lake City, Cheyenne, Denver, and points east and south to the Atlantic Seaboard and the Gulf of Mexico. For a comparatively short distance, from Ogden through Salt Lake City to Provo, where the Los Angeles line swings southwest, the Union Pacific and the Rio Grande parallel and serve some common points. To and from these points, joint rates and through routes are maintained by the Union Pacific over its lines with the northwest territory and the area east of Cheyenne and Denver served by the Union Pacific. The Union Pacific does not maintain joint through rates with the Rio Grande, with

certain exceptions not material in this proceeding. Freight moving from the northwest territory to points in southern Utah and Colorado on the Rio Grande, finally destined to points east of the eastern termini of the Rio Grande, moves on the combination rate, consisting of the total of the Union Pacific rate to Ogden via Union Pacific and the Rio Grande rate from Ogden via Rio Grande to points on the Rio Grande. The same is true of the rates on shipments from points east of Denver to those points on the Rio Grande finally destined to the northwest territory. This combination of rates, or combination rate, as it is called, is considerably higher than a joint through rate Freight moving from and to the northwest territory from and to all points east of Denver[1] served by the Union Pacific and connecting car-

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1 "All points east of Denver" will be used as the designation of all points included in the Commission's order to or from which through routes and joint rates were ordered established by the Union Pacific with the Rio Grande. The Commission's order in this respect was (287 I. C. C. 611, 659):

> "We conclude:
>
> "1. That is is necessary and desirable in the public interest, in order to provide adequate and more economic transportation, that through routes, and joint rates over such routes the same as apply over the Union Pacific and its connecting lines, defendants herein, be established via Ogden or Salt Lake City, in connection with the Rio Grande, on granite and marble monuments, in carloads, from origins in Vermont and Georgia to destinations in the excluded territory in the northwest area, as previously described herein, and on ordinary livestock, fresh fruits and vegetables, dried beans, frozen poultry, frozen foods, butter, and eggs, in carloads, from origins in the excluded territory to destinations in the United States south and east of a line drawn along the southern boundary of Kansas, thence the eastern boundary of Kansas to but not including Kansas City, thence immediately west of points on the Missouri River from Kansas City, Kans., to Omaha, thence immediately north of points on the route of the Union Pacific and the Chicago & North Western from Omaha to Chicago, including destinations in the Lower Peninsula of Michigan and in Oklahoma and Texas."

riers has the benefit of joint through rates via Union Pacific, with accompanying in-transit privileges en route, while freight originating on the Union Pacific in the northwest territory and moving to the area east of Denver, which is routed over the Rio Grande, pays the combination rate without in-transit privileges at points on the Rio Grande. The result is that practically all of the long-haul traffic originating in the northwest area and destined to the area east of Denver goes over the Union Pacific all the way on the lower joint and through rates. Since the formal record before the Commission consists of 1,957 pages of testimony, 57 exhibits and 74 verified statements, the foregoing statement is obviously only a salient outline of the basis for the Rio Grande's complaint. For a complete understanding of the intricacies of the case by one unfamiliar with the record, it will be necessary to refer to the extensive report and order of the Commission reported in 287 I. C. C. 611.

The Commission ordered the establishment of through routes and joint rates via Ogden or Salt Lake City by the Union Pacific with the Rio Grande for the transportation of granite and marble monuments in carloads from points of origin in Vermont and Georgia to destinations in the northwest area, and on ordinary livestock, fresh fruits and vegetables, dried beans, frozen poultry, frozen foods, butter and eggs, in carloads, from points of origin in the northwest territory to destinations "east of Denver." The order is based upon three primary basic findings. First, that the through routes and joint rates are necessary and desirable in the public interest, in order to provide *adequate and more economic transportation;* second, that the existing joint rates maintained by the Union Pacific are and will be *unjust and*

unreasonable and unduly prejudicial to shippers and receivers of freight using or desiring to use the Rio Grande and *unduly preferential to shippers and receivers of freight using the Union Pacific;* third, that the maintenance by the Union Pacific of joint rates with the Bamberger Railroad between the northwest area and points on the Bamberger line between Ogden and Salt Lake City, while refusing to establish joint rates with the Rio Grande to and from the same points on the Rio Grande between Ogden and Salt Lake City, subjects the Rio Grande to discrimination in violation of Sec. 3 (4) of the Interstate Commerce Commission Act. Finding No. 1 has heretofore been quoted in footnote 1. Findings 2 and 3 are set out below.[2] To understand the import of these findings it is necessary to explain the factual theory upon which they are based.

First as to the finding that the rates ordered are necessary and desirable to provide adequate and more economic transportation. Located along the route of the Rio Grande, between Ogden on the west and Denver, Pueblo and Trinidad on the eastern termini, are a num-

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2 "2. That the assailed rates on the commodities and from and to the points described in the foregoing finding are and for the future will be unjust and unreasonable, and unduly prejudicial of shippers and receivers using, or desiring to use, the Rio Grande routes and unduly preferential of shippers and receivers using the Union Pacific routes, in and to the extent that they exceed or may exceed the joint rates maintained on such commodities from and to the same points over the Union Pacific routes:

"3. That the maintenance by the Union Pacific and other defendants of joint rates between points in the northwest area, on the one hand, and points on the Bamberger Railroad south of Ogden, on the other hand, while refusing to participate in like rates to and from the same points on the Rio Grande south of Ogden, subjects the Rio Grande to discrimination in violation of section 3(4) of the act."

287 I. C. C. 611, 659-660.

ber of livestock feeders. Some of these are ranchers who graze and feed cattle and sheep. Others are operators of beet sugar plants which produce livestock feed as a by-product and feed the by-product to livestock. These livestock feeders buy cattle and sheep in the northwest area, which are ultimately destined for the market, and ship them to points on the Rio Grande for feeding. Many of the principal livestock markets of the United States are located east of Denver. Without joint through rates with in-transit privileges which would permit these livestock feeders to ship from the northwest area to the feeding points on the Rio Grande and then reship on joint through rates to points east of Denver, Pueblo, and Trinidad, they are at a substantial rate disadvantage with similar livestock feeders following the same practice who are located on the Union Pacific lines between Ogden and Provo, and between Ogden and Salt Lake City and Denver, located on the Union Pacific, who reship to points east of Denver. They are also at a substantial rate disadvantage in purchasing livestock in the northwest area in competition with buyers located on the Union Pacific lines west of Denver and Cheyenne who have the benefit of joint through rates and in-transit privileges over the Union Pacific.

Also located on the Rio Grande are a number of industries which clean, package, process, freeze, and store fresh fruits, vegetables, poultry, food products, butter, eggs and beans, and ship them on east to points beyond Denver, Pueblo and Trinidad. These industries are at a comparable rate disadvantage, without in-transit privileges, as livestock feeders, and for the same reasons.

Monument dealers obtaining or shipping granite and marble from Vermont and Georgia are unable to ship full carloads to the northwest territory and have the rate ad-

vantage of partially unloading cars at intermediate points on the Rio Grande under in-transit privileges of through routes and joint rates which are available at points located on the Union Pacific.

This finding, which is finding No. 1 quoted in the footnote, is held by the Commission to justify ordering the establishment of through routes and joint rates under Secs. 15 (3) and 15 (4), Title 49 U. S. C. A. Secs. 15 (3) and 15 (4). Sec. 15 (3) empowers the Commission to establish through routes and joint rates when necessary or desirable in the public interest,[3] but Sec. 15 (4) prohibits the Commission from ordering the establishment of through routes by a carrier under Sec. 15 (3) without the carrier's consent if the result would be to short-haul that carrier unless, as provided by Sec. 15 (4), the Commission finds that the through route is needed in order to provide (1) *adequate* and (2) *more efficient* or *more economic* transportation.[4]

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3 "Sec. 15 (3) The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, * * * establish through routes, * * * and joint rates, * * * applicable to the transportation of * * * property by carriers subject to this part, * * *."

4 "Section 15 (4) In establishing any such through route the Commission shall not * * * require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, * * *. (b) unless the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation: **Provided, however,** That in prescribing through routes the Commission shall, so far as is consistent with the public interest, and subject to the foregoing limitations in clauses (a) and (b), give reasonable preference to the carrier by railroad which originates the traffic. No through route and joint rates applicable thereto shall be established by the Commission for the purpose of assisting any carrier that would participate therein to meet its financial needs. * * *."

The Commission accurately states the legal effect of Sec. 15 (4) in its report (*Denver & R. G. W. R. Co. v. Union Pac. R. Co.*, 287 I. C. C. 611) at page 655 as follows:

> "Since the two decisions last above referred to, section 15 (4) has been amended (in 1940), so that now the prohibition against short hauling is subject, not only to the exception that such inclusion of lines must not make the through route unreasonably long as compared with another practicable through route which could otherwise be established, but to the additional exception that the short-hauling provision may be disregarded where the 'through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation.' Thus, where as here we are asked to disregard the short-hauling provision, we must give consideration, first, to the adequacy of the transportation, and second, to the efficiency and economy of the transportation. In Pennsylvania R. Co. v. United States, 323 U. S. 588, which affirmed the judgment of a lower court sustaining an order of division 2 in D. A. Stickell & Sons, Inc., v. Alton R. Co., supra, the Supreme Court said that the expressions 'more efficient or more economic' transportation, as used in section 15 (4), 'may well embrace both shippers' and carriers' interests, * * * that both interests should be considered and a fair balance found.' These latter considerations are not determinative, however, unless the existing routes can be found not to provide 'adequate' transportation.
>
> "In the proceeding just mentioned, the Supreme Court said that adequacy of transportation relates only to the interest of the shipping public, whereas, as above stated, efficient and economic transportation embraces both shipper and carrier interests."

Was there evidence to support the finding of inadequacy? Only in the event there was inadequacy of trans-

portation can the question of efficiency or economy be reached. It is clear from the report and the evidence that the finding of inadequacy is based upon the lack of in-transit privileges by shippers and receivers located on the Rio Grande as to the commodities embraced in the order. There is no evidence to support a finding that the physical transportation facilities furnished by the Union Pacific between the northwest area, on the one hand, and points east of Denver are inadequate. There is abundant support, however, for the finding that the service is inadequate to patrons of the Rio Grande, located on the Rio Grande between Ogden on the west and Denver, Pueblo, and Trinidad on the east (not served by the Union Pacific between Ogden and Provo), who do not have in-transit privileges with respect to freight moving from the northwest area which is to be reshipped to points east of Denver, if under the law the lack of in-transit privileges many constitute "inadequacy." That is also true as to the service to shippers of marble and granite from Vermont and Georgia to initial points on the Rio Grande who need the in-transit privileges of partial unloading or processing enroute, incident to reshipment to final destination points beyond Ogden in the northwest area. The foregoing inadequacies are based upon the premise that the lack of in-transit privileges constitutes inadequacy of service within the meaning of clause (b) of Sec. 15 (4). The Union Pacific vigorously contends that it does not. This question presents the crux of this case. If, as the Union Pacific contends, in-transit rights and privileges are matters over which the Commission under the law has no control, the existence or granting of which is subject only to managerial discretion of the carrier, and relate only to economy or efficiency of transportation to the exclusion of considerations of adequacy of transportation, then the lack

of in-transit privileges will not suffice as a proper basis for ordering "adequate" transportation. The argument is made in effect that since the transportation facilities are now available over the Union Pacific and the Rio Grande on the higher combination rates, the present non-existence of in-transit privileges relates only to the cost or economy of transportation. Reference is made to excerpts from opinions which it is said support the conclusion that the Commission may not under its general regulatory power force a carrier to provide or establish in-transit privileges. The question has many ramifications. We are confronted only with determining whether a finding of inadequacy of transportation may be legally based upon the absence or lack of services which are incidents of and to in-transit privileges. If that be true, the Commission may order the establishment of through routes and joint rates, with their ordinary incidents—in-transit privileges—when such action is necessary in order to provide adequate transportation. We are convinced that the Commission does have that power. *Pennsylvania R. Co., et al., v. United States, et al.*, 323 U. S. 588, 54 F. Supp. 381.

But the inadequacy established by the evidence does not extend to shipments from the northwest area to initial destinations east of Denver. The same is true of shipments of monuments from Vermont and Georgia to points of initial destination in the northwest territory. Transportation service is now adequate between those points. There is ample evidence to support the finding that the establishment of the through routes and joint rates between the northwest area and points on the Rio Grande (not also served by the Union Pacific between Ogden and Provo), as to shipments which require in-

transit privileges at points on the Rio Grande for reshipment to points east of Denver, will result in more economical transportation. Differences in mileage and other comparative factors are for the Commission to weigh, evaluate and determine. Its ultimate factual conclusion may not be overturned when supported by the evidence. But, again, there is no evidence that the service is inadequate or that more economical transportation service will result with respect to shipments from the northwest area to points between Ogden and Provo served by both the Union Pacific and the Rio Grande and to be reshipped to final points of destination east of Denver. The transportation facilities are shown by the evidence now to be adequate, with in-transit privileges between those points over the Union Pacific. And that service is as economical via the Union Pacific as it would be over the Union Pacific and the Rio Grande if the through route and joint rates were established. The evidence therefore sustains the finding of inadequacy and the need for more economical transportation only as to (1) carload shipments of commodities embraced in the Commission's order from points in the northwest territory destined to points of final destination east of Denver which require in-transit privileges at points on the Rio Grande; (2) shipments of granite and marble monuments from Vermont and Georgia to final destinations in the northwest territory which require in-transit privileges at points on the Rio Grande not also served by the Union Pacific. If the order had been so limited to the evidence it would eliminate short-hauling the Union Pacific except as to shipments requiring service which is now inadequate and which service the Union Pacific cannot now give. It would eliminate the charge made by the Union Pacific that the order was for the purpose of assisting the Rio Grande to meet its fi-

nancial needs, and, more important, it would have rested squarely within the authority of clause (b) of Sec. 15 (4).

The second finding, that the combination rates maintained by the Union Pacific and the Rio Grande are unduly prejudicial to shippers using or desiring to use the Rio Grande and unduly preferential to shippers and receivers using the Union Pacific to the extent they exceed the joint and through rates available to shippers located on the Union Pacific, is made for the purpose of bringing the order within the authorization of Sec. 3 (1). Title 49 U. S. C. A. Sec. 3 (1). That section is as follows:

> "Sec. 3 (1). It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however*, That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description."

The situation which this finding seeks to correct, simply stated, is that the shippers and receivers of the designated commodities located on the Rio Grande who do not have in-transit privileges and joint and through rates are at an economic disadvantage compared to shippers

and receivers located on the route of the Union Pacific who do have joint and through rates and in-transit privileges.

If the prejudice and preference shown by the evidence falls within the prohibitions of Section 3 (1) the Commission may correct it irrespective of whether the factual situation authorizes the order under Secs. 15 (3) and 15 (4) heretofore considered. But the prejudice and preference prohibited by Sec. 3 (1) relate to prejudice and preference shown by one carrier or a combination of carriers between the entities named in 3(1) which are served by the one carrier or the combination acting as one. The prohibition of Sec. 3 (1) is intended to prevent a carrier from giving preferences or advantages, over which the carrier has control, to one of the entities named and not to another. It does not apply to a situation such as this where the comparison of preferences and advantages or prejudices and disadvantages is between the entities named when they are located on the lines of different carriers not acting in concert or collusion. Although the factual situation in *Central R. Co. of New Jersey v. United States*, 257 U. S. 247, was different, the purpose of Sec. 3 (1) was there stated as follows (Loc. cit. 259-260):

> "What Congress sought to prevent by that section, as originally enacted, was not differences between localities in transportation rates, facilities and privileges, but unjust discrimination between them by the same carrier or carriers. Neither the Transportation Act 1920, February 28, 1920, c. 91, 41 Stat. 456, nor any earlier amendatory legislation has changed, in this respect, the purpose or scope of § 3."

If the Commission could order through routes and joint rates between two or more competing railroads under

Sec. 3 (1) merely because a shipper entity described in Sec. 3 (1) located on one railroad had a transportation advantage over such an entity located on the other railroad, the prohibition of Sec. 15 (4) would be practically emasculated. The evidence of preference, advantage, prejudice or disadvantage, under these circumstances, furnishes no basis for the order under Sec. 3 (1).

The third finding, heretofore quoted, to the effect that the maintenance by the Union Pacific of joint rates with the Bamberger Railroad to and from points in the northwest area and points on the Bamberger line from Ogden to Salt Lake City, inclusive, while refusing to maintain joint rates with the Rio Grande on shipments from the northwest area to the points served by both the Rio Grande and the Bamberger Railroad from Ogden to Salt Lake City, inclusive, discriminates against the Rio Grande, is based on Sec. 3 (4), which is as follows:

> "Sec. 3 (4) All carriers subject to the provisions of this part shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term 'connecting line' means the connecting line of any carrier subject to the provisions of this part or any common carrier by water subject to part III."

The Bamberger Railroad is an electric line operating only from Ogden to Salt Lake City, serving those

cities and intermediate points. The Rio Grande serves all points served by the Bamberger. The criterion for determining unlawful discrimination under Sec. 3 (4) is stated by the Commission at page 658 of its order as follows:

> "A finding of discrimination under section 3 (4) of the act must be supported by a showing that the transportation conditions are no less favorable over the routes alleged to be discriminated against than over the routes said to be preferred."

The Commission found there was no important dissimilarity between the transportation conditions in connection with the Bamberger and those in connection with the Rio Grande. Upon this record that factual conclusion may not be disturbed. Section 3 (4) clearly prohibits such discrimination. The Commission's order in this respect is valid under Section 3 (4).

Considerable attention has been given by the Union Pacific in its brief to the action of the Commission in rejecting a portion of evidence offered by it in an attempt to show improper conduct in the preparation and presentation of the Rio Grande's case before the Commission. We do not find justification for serious consideration of that question.

Findings of Fact

I.

The finding of the Commission that present transportation facilities between the northwest area and points of initial destination east of Denver are inadequate is not supported by the evidence, because present transportation facilities over the Union Pacific between such points are adequate. And the evidence shows that the estab-

lishment of joint rates and through service via the Union Pacific and the Rio Grande between the northwest area and points of initial destination east of Denver, Pueblo, and Trinidad would not make such service more economical, because the rates for such service would only equal the present rates via the Union Pacific between those points.

II.

The record supports the Commission's finding that present transportation service between the northwest area and points of initial destination on the Rio Grande (not also served by the Union Pacific between Ogden and Provo) is inadequate and also inefficient and uneconomical as to shipments of the commodities specified by the Commission from the northwest area to initial points of destination on the Rio Grande west of Denver, which require in-transit privileges enabling their reshipment on joint through rates to points of final destination east of Denver.

III.

The record supports the Commission's finding that present transportation service for granite and marble monuments, in carloads, originating in Vermont and Georgia, consigned to initial destination points on the Rio Grande, requiring unloading and in-transit privileges for continued movement to points in the northwest territory, is inadequate and uneconomical and that the establishment of joint rates and through service is necessary in order to provide adequate and more economic transportation for such shipments.

IV.

The evidence supports the finding that as to designated items of traffic moving from the northwest area,

shippers and receivers of freight located on the Rio Grande are at an economic disadvantage compared with shippers and receivers of freight from the northwest area who are located on the Union Pacific. But there is no community of interest between the Union Pacific and the Rio Grande and hence there is no discrimination by the Union Pacific within the prohibition of Sec. 3 (1).

V.

The evidence supports the finding of the Commission, referred to and quoted herein as Finding 3, that unlawful discrimination prohibited by Sec. 3 (4) is being practiced by the Union Pacific in refusing to establish through routes and joint rates with the Rio Grande comparable to those existing between the Union Pacific and the Bamberger Line on traffic moving from the northwest area to points served by both the Bamberger Line and the Rio Grande between Ogden and Salt Lake City.

Conclusions of Law

I.

The absence of in-transit and other privileges involved herein, incident to through joint rates will, under the law, support a finding that transportation service without such services and privileges is inadequate within the meaning of Sec. 15 (4). The evidence therefore supports the finding of the Commission that the establishment of through routes and joint rates between the Union Pacific and the Rio Grande is necessary in order to provide adequate and more economic transportation of the designated commodities in carloads originating in the northwest area, consigned to initial destination points on the Rio Grande west of Denver, Pueblo and Trini-

dad, which require in-transit privileges incident to reshipment to points east of Denver, Pueblo and Trinidad. As to such commodities the order of the Commission is valid under Secs. 1, 15 (3) and 15 (4) of the Act and does not violate the direction of Sec. 15 (4) that reasonable preference be given the carrier which originates the traffic.

II.

The evidence supports the finding of the Commission that it is necessary, in order to provide adequate and more economic transportation of shipments of marble and granite monuments in carloads from points in Vermont and Georgia to points of final destination in the northwest territory, which require unloading and in-transit privileges at points on the Rio Grande incident to the continuation of the shipment to the northwest area, that through routes and joint rates be established between the Union Pacific and the Rio Grande as to such shipments.

III.

To the extent that the order of the Commission requires the establishment of through routes and joint rates between the Union Pacific and the Rio Grande on carload traffic moving from the northwest area to points on the Rio Grande, which traffic is to be reshipped to points east of Denver, but which is of such nature or character that it does not require stoppage-in-transit privileges, which are incident to in-transit privileges, and as to all traffic moving from the northwest area to points of original destination east of Denver, Pueblo or Trinidad, said order is not valid, because Sec. 15 (4) constitutes a limitation on the power of the Commission to order establishment of through routes which will result in short-hauling the Union Pacific, unless that be necessary

in order to provide, inter alia, adequate transportation. Since the evidence does not justify a finding of fact that the establishment of such routes and rates is necessary to provide adequate transportation for commodities of the character stated or to the destinations specified in this paragraph, that factual premise, essential to the validity of the order, is lacking.

IV.

To the extent the Commission requires the establishment of through routes and joint rates between the Union Pacific and the Rio Grande at Ogden on carload traffic moving from the northwest area to points between Ogden and Salt Lake City, inclusive, served by both the Rio Grande and the Bamberger Line, the order is valid for the purpose of removing an unlawful discrimination against the Rio Grande under Sec. 3 (4) of the Act.

To the extent stated in the foregoing opinion, findings of fact, and conclusions of law, the order of the Commission will be enjoined. The cause is remanded to the Interstate Commerce Commission for such further proceedings as it may deem appropriate, consistent herewith.

Civil Action No. 76-53

Union Pacific R. Co. vs. United States.

JOHNSEN, Circuit Judge, dissenting:

The Commission has here used standards and criteria for the exercise of its power to compel through routes and joint rates, which I think are beyond the warrant of the statute. The majority opinion upholds in part the result which the Commission has so reached.

What the Commission purports to make the primary basis for its establishing of through routes and joint rates over the Rio Grande is "perishable food articles." Here, as taken from its Report, are the manner and perspective of its approach to the question.

"Growers [of perishable food articles in Idaho, located on the Union Pacific] * * * market such products throughout the United States. In order to get as wide a distribution as possible, those growers and other growers in the northwestern area [that part of Utah lying north of Ogden, and the States of Idaho, Montana, Oregon and Washington] need as many markets and outlets as possible."[1] 287 I. C. C. at page 642. To comprehend or evaluate that need, says the Commission, "it is necessary to consider the nature, extent and functioning of our in-

1 It should be noted that the situation covered by the Commission's order does not involve the matter of joint rates to intermediate points on the Rio Grande as final destinations. Joint rates already apply to such traffic. The question is one of through routes and joint rates for traffic having a billing origin and destination outside of Rio Grande territory, and for which the Rio Grande therefore would merely be serving as a "bridge" line only, while the Union Pacific, on whose branch lines most of the traffic originates, would be caused to lose a line-haul thereon of 975 miles.

tricate and far-flung commodity marketing system." P. 655. The importance, in our condition of growing population and national development, of having "a constantly expanding flow of diverse commodities" and "particularly articles of food" is emphasized. The comment is made that "A complex but efficient marketing system has been evolved to provide as orderly a distribution of food commodities as possible," and the truism is expressed that "Adequate transportation facilities and services are required for the proper functioning of the system." P. 656.

Then follows what seems to me to represent the crux of the Commission's concept and standard in what it did.

1. "Because of their generally perishable nature, food articles, such as fresh fruits and vegetables, frozen poultry, frozen foods, butter, eggs, ordinary livestock, and dried beans, must be moved to market with expedition and care, and *over as many routes as possible*. This requires that many routes be open in order that unnecessary interruptions of the free flow of such commodities may be avoided and that *as much flexibility as possible in the distribution process*, be permitted." (Emphasis mine.) P. 656.

2. "A number of services, not only at origin and destination, but enroute, which are not usually required in the movement of ordinary traffic, must be provided for these perishable and semiperishable commodities." In-transit privileges, "such as stopoff for partial unloading, storing, or processing in transit, or for feeding or grazing livestock in transit," are available at various points on the Union Pacific to through-shippers, on the basis of the joint rates applicable over that route, and

similar privileges exercisable on the Rio Grande could be made available to such shippers, at a lower cost than under the present combination rates, by establishing competitive through routes and joint rates over that road, so that those desiring to have the benefit of these additional facilities would be able to enjoy them on the same basis as those on the Union Pacific. Because the use of such transit facilities on the Rio Grande are not available in the same manner as those on the Union Pacific, "The shippers in the originating area involved in this complaint with respect to these commodities are debarred from effective participation in the widespread system developed for the marketing of such commodities." P. 656.

3. The Commission does not attempt to explain how the failure of such through-shippers as a general class to have access to the transit privileges on the Rio Grande on the same rate basis as on the Union Pacific, can thus broadly and absolutely be declared to debar them "from effective participation in the widespread system developed for the marketing of such commodities." In the absence of such an explanation, and on the implication of what the Commission has precedingly said in its Report, as set out above, the only deduction that I am able to make is that the Commission regards all shippers of perishable commodities as having a right generally or abstractly, upon an expressed desire by any of them in a particular situation, to be given "as many routes as possible" and "as much flexibility as possible in the distribution process," because otherwise they will be "debarred from effective participation in * * * the marketing of such commodities."

In other words, whenever it is possible physically and practicably to open up a new or an additional through

route for such commodities, the Commission apparently feels entitled to exercise its power to do so, in order to make available any increase in the amount of transit privileges en route which can be provided for such through-traffic, on the basis of simply declaring, as it in effect did here, that the previous through routes are inadequate, since they lack the additional transit privileges of the new carrier's route, which some shipper may desire or can solicitedly be persuaded to use, and on the basis of further holding that the other prerequisite of section 15 (4) of the Act, 49 U. S. C. A. § 15 (4), where the element of short-hauling another carrier is involved, as it is here, that such an added through-route must also provide "more efficient or more economic transportation" than that existing on the present through routes, can sufficiently be satisfied by merely resorting to the Commission's power under section 15 (3) to prescribe joint rates and pointing out that joint rates necessarily in the situation will provide "more economic transportation," since they obviously are lower than the previous combination rates.

I have grave legal doubt whether the Commission's power to establish joint rates under section 15 (3) has any relationship to the term "more economic transportation" in section 15 (4), dealing with the Commission's right to open up through routes. Rather, it seems to me that the term "more economic transportation" in section 15 (4) is intended to have reference to the elements of distance, time, equipment, cost of operation, territorial reach, and all those other quantitative and qualitative factors which are inherent in a transportational comparison from the standpoint of the interests of both the public and the carriers—and that the Com-

mission's power to establish joint rates under section 15 (3) is one which has application only after through routes exist or are established, without the right to use it as a factor under section 15 (4) for satisfying the requirements of opening up a long-haul-depriving, additional through route.

But however this may be, I am at least convinced that, where the question is one, as here, of opening up, not an initial through route, but an additional one for the same through-traffic to the same ultimate destinations, the Commission's power to establish joint rates cannot be made to constitute the sole ingredient or content of the term "more economic transportation" under section 15 (4), in the addition of another carrier's route as a mere "bridge" line for such traffic. If that be not so, then there is not any situation in which the Commission can not make a finding of "more economic transportation" for whatever additional through route it may undertake to open up, since in all cases joint rates necessarily, from their very nature, are lower than combination rates otherwise applying.

Let me add in summary that, if it can properly be held, as the Commission has done here, that perishable commodities are entitled to "as many routes as possible" and "as much flexibility as possible in the distribution process," so that on this basis, and without regard to any other factor, any existing through route can be called inadequate, because it is possible to create additional transit privileges or facilities for such traffic by opening up another through route over another railroad, serving as a bridge line, and further such new route can be declared to provide "more economic transportation," because by placing joint rates in effect the cost of using

such new through route for its transit facilities will be less than under the general combination rates previously existing, then the railroads of the country may as well forget section 15 (4) entirely, as affording them any protection whatsoever against deprivation of their long hauls.

Here the opening up of a through route over the Rio Grande as a bridge carrier for the transcontinental freight involved will deprive the Union Pacific of a long haul of 975 miles upon such traffic as the Rio Grande is able to solicit away from it. But this is not the sole purport or effect of the Commission's order. If the order is upheld either in whole or in part, on the basis on which the Commission's result has been reached, the Commission can hereafter exercise its power to require through routes and joint rates from every connecting point in the country against every existing carrier, since every new through route necessarily will afford additional transit privileges and every joint rate necessarily will reduce the cost of using the new through route as against the combination rate previously applicable.

Nor should one allow oneself to be blinded to what the real scope and significance of the Commission's reach here is. What it has purported to paint the picture of, in relation to its standard of "as many routes as possible" and "as much flexibility as possible in the distribution process" is, as previously indicated, "perishable food articles." But it has, by means of some artificial classification, included ordinary livestock as a perishable food article (p. 656), saying merely, before doing so, that "We think, however, that the situation here as to livestock is no different from that portrayed as to certain

other commodities with respect to the need for competitive routes over the Rio Grande via the Ogden gateway." And it has further held that a little monument dealer, located on the Union Pacific in Utah, is entitled to have established for him a through route and joint rates on the Rio Grande, in order to have the transit privilege available to him of unloading locally, here and there in Colorado, on a through rate basis, some individual monuments out of an estimated four-carload lot of monuments per year.[2]

All of this to me is but another attempt by the Commission to gain a new foothold, under another disguise, for the philosophy and position that it should have the right to put into effect as many new through routes as it deems advisable, without being required to give consideration to the question of short hauling another carrier. It has repeatedly asserted that viewpoint and sought to gain that end. But Congress has never been willing to accede to that philosophy and position, and the courts have on a number of occasions had to strike down the Commission's efforts in that direction. All

2 I shall not take the time to go into the details of this trivial monument situation, which the Commission characterized as one of "urgent need" (Page 638), except to comment that it is typical of the Commission's approach, result and intended reach. Why a little dealer, who wants to make local peddlings of 4 carloads of tombstones is entitled to have the Union Pacific join in giving him the opportunity to do so on a through rate basis is a bit beyond me. But more than this, if tombstones, constitute a commodity that is entitled to this extreme transit privilege, on the same basis as perishable foods, then the Commission's purported basis of "as many routes as possible" and "as much flexibility as possible in the distribution process" for perishable foods is meaningless, and it seems rather apparent what this initial action of the Commission here portends for the transportation system generally of the country.

this is familiar history in the railroad world, and I shall not bother to go into it further here.

It is on the basis of the unqualified use of that standard here in relation to perishable commodities, and the attempt to get the camel's nose under the tent as to one or two other commodities also, in a smothered, beginning approach to an apparently wider future reach, that I would strike down the Commission's order. I think that anyone who reads the Commission's Report, in the light of what I have said, and stripped of all the confusion in which the Report has been wrapped, will have no convictional difficulty as to the implications which I have pointed out.

I do not mean to make any implication, nor do I here assume to pass judgment, on whether the Ogden gateway is in other manner or to other extent subject to being opened up. All I say is that the philosophy and standard of "as many routes as possible" and "as much flexibility as possible in the distribution process" can not be made the basis for overriding the short-hauling provisions of section 15 (4), through the merry-go-round device of calling all transportation inadequate without the availability of every bit of transit privilege that exists on any connecting carriers aggregately, and of construing the term "more economic transportation" to mean nothing more than the difference between joint rates placed in effect and the combination rates previously existing.

The philosophy and standard which the Commission has used are unquestionably sound as a marketing principle, but the railroad transportation system of the coun-

try has never yet been relegated by Congress to the full impact of marketing principles alone. There is not a distributor of any commodity—including perishable foods—who, up to the time at least of the Commission's present order, has had, or has been regarded as being entitled to have, as a matter of sound transportational concept, every avenue and facility that it is possible to open up for him, with a simple brushing aside of transportational conditions, realities and consequences, such as I think the Commission here did.

I have previously referred to the fact that most of the traffic that is here involved originates on the branch lines of the Union Pacific, and that on such of this traffic as the Rio Grande is able to solicit to use its route, the Union Pacific will lose a line haul of 975 miles. The Report of the Commission admits that "the extent to which the Union Pacific route is shorter than the route sought by the Rio Grande to and from points between which most of the traffic here concerned moves" is about 200 miles. Page 654. It also recognizes that the Rio Grande is a mountainous route, of higher grades, more circuity, and greater operational costs than the Union Pacific. "The total rise and fall in feet on the Rio Grande is 66.3 per cent greater than that of the Union Pacific. Other data as to physical characteristics of the two lines show that the Rio Grande line is less favorably situated than that of the Union Pacific. Traffic routed over the Rio Grande as a bridge line would require at least 24 hours additional time in transit than when routed over the Union Pacific, and would require one or two more terminal-yard services." Page 648.

All of these matters, however, the Commission lightly brushes aside, as not having relationship to the question

of "more economic transportation" in the situation, and so leaving it free to hold, as above indicated, that the new through route provides "more economic transportation," because its joint rates necessarily are lower than the previously applicable combination rates. All that the Commission says, in brushing aside the transportational differences which I have set out, as not requiring consideration on the question of "more economic transportation" in the situation, is that, when they are spread over hauls of such great lengths as are here involved "they become relatively insignificant." Page 658.

The Report does not undertake to show what amount of traffic goes where. It merely says that "About 90 per cent of the traffic upon which joint rates are sought via Ogden and the Rio Grande moves to (Missouri River crossings and points east and southeast) and about 10 per cent to the Southwest." Page 626. How much terminates at the Missouri River crossing-points or at other midwestern destinations, the Report does not state. As to livestock, however, it certainly is a matter of common knowledge that the primary markets are Chicago, Omaha, Kansas City and some other Missouri River points. To each of these points, as well as to the Minneapolis and St. Louis markets, the record shows that a haul of 200 miles more, and a transportation time of at least 24 hours longer, as well as at least one or two more terminal-yard services, are involved over the Rio Grande route. I do not believe that without rational demonstration the Commission can say, except arbitrarily, that in relation to hauling distances of 1036 miles (Omaha) or 1153 miles (Kansas City) or 1524 miles (Chicago), the elements of difference which I have set out are so "relatively insignificant" as to be entitled to be ignored on the ques-

tion of whether "more economic transportation" is being provided. And in the absence also of some demonstration or analysis of quantities and destinations as to the various other commodities involved, I do not believe that the Commission can be said to have any less arbitrarily brushed off the facts of the transportational and service differences existing, as related to the question of "more economic transportation" under the statute, than in the case of livestock, when it merely attempts to push all of the facts abstractly to a far-distant horizon, without establishment of the reality of that horizon for lumping purposes.

Incidentally, I also may add that what the Commission has here done as to livestock is a departure or exception from the long-established general livestock scheme, practice and policy which the Commission has previously recognized and accepted. In *Livestock, Western District Rates*, 176 I. C. C. 1, 190 I. C. C. 175, 190 I. C. C. 611; 200 I. C. C. 535, the Commission prescribed rates on livestock in western territory, predicated generally on the shortest routes over which carload traffic could be moved without transfer of lading, but the carriers were not required to maintain the rates over such routes where it would result in short hauling within the meaning of section 15 (4) of the statute. In establishing the prescribed rates, the carriers limited their application, as the Commission itself has recognized, over routes which did not result in short hauling, and over other and longer routes provided higher rates, either by the addition of arbitraries or the application of the mileage scales over the longer routes, giving consideration to the distance involved. This the Union Pacific was willing to do in relation to the Rio Grande's route. It would seem to me that the upsetting

of this general, established scheme, practice and policy as to livestock rates, in the present situation, apart from the other aspects of the question here involved as to the livestock, is entitled to some explanation on the part of the Commission, if it is to escape the implication of an arbitrary departure as against the Union Pacific in its long-hauling of livestock from the northwest territory, as related to the differential permitted to be created by other carriers generally in such situations.

This dissent is being written hastily in order not to delay the filing of the majority opinion, and I shall accordingly not take the time to go into detail on other matters. I agree with the majority that the Commission had no right here to find a violation of section 3 (1) of the Act against the Union Pacific and its connecting through-route carriers, but the basis for my view is not that adopted by the majority, that a discrimination under this section cannot at all exist, unless the complaining person or entity is located upon the lines of the carrier or combination of carriers claimed to have committed the discrimination. I do not believe that this viewpoint is tenable on the language of section 3 (1), nor on the expressions contained in *St. Louis Southwestern Ry. Co. v. United States*, 245 U. S. 136, 144, as well as on the plain, contrary assumptions made in *Texas & Pacific Ry. Co. v. United States*, 289 U. S. 627. But on the factual elements that are involved in the present situation I do however not think that there exists any basis on which to declare the Union Pacific and its connecting through-route carriers guilty of unreasonable preference or unreasonable prejudice under section 3 (1), in having refused to join with the Rio Grande to make the latter available as a bridge line for hauling through traffic at

the same rate, over a 200-mile longer route, with a 66.3 per cent greater variation in grade, involving a 24-hour additional hauling time, and necessitating the furnishing of several more terminal-yard services. I do not believe that these facial railroad realities would permit of a finding of such a discrimination as was intended to be reached by section 3 (1). If the Commission had attempted to predicate the relief which it here granted upon the existence of a violation of section 3 (1), I am certain that its action resting on this basis alone could not on these facial realities be upheld. Only an escape from these facial realities, through a dissolution of them under the considerations open to the Commission in section 15 (4), such as the Commission here attempted, could at all, in my opinion, on the facts of the situation, have furnished a basis for the prescribing of through routes and joint rates in relation to the existing conditions.

In the pattern of the Commission's apparent attempt to strike at as much in the present situation as possible, the Commission further, as noted in the majority opinion, required the Union Pacific to establish joint rates with the Rio Grande to and from the same points where it maintained joint rates with the Bamberger Railroad. The Report says: "The Bamberger operates, for about 36 miles, between Ogden and Salt Lake City, and it appears that there is no important dissimilarity between the transportation conditions in connection with the Bamberger and those in connection with the Rio Grande." P. 659. The brief of the Union Pacific argues pointedly that "No evidence was submitted concerning or comparing transportation conditions on the Bamberger's electric line between Ogden and Salt Lake City with conditions on the Rio Grande." The brief of the Commission makes

no denial of the fact that no such evidence is contained in the record. The most that the Commission could properly have said, I think, was that it had not been made to appear by the evidence that there was any important dissimilarity in the conditions on the two roads. But the lack of any such evidence of dissimilarity could hardly afford a basis for a finding of similarity on the part of the Commission. This segment of the Commission's order is perhaps of relatively small importance in the present controversy. I refer to it simply as being characteristic or in the pattern of the loose and improper basis and manner in which it seems to me that the Commission has dealt with the entire situation.

I would strike down the Commission's order, generally, on the basis and manner in which its result has been reached. In taking that position, however, I would again emphasize that I intend no implication that there may not exist some proper basis and some proper manner of reach as to some parts of the Ogden gateway situation. I have not allowed my mind to look at that avenue, in either one direction or the other. The pervading infirmities on which the Commission's present order seems to me to rest make it sufficient and compel me to halt my judicial consideration right there.

APPENDIX E

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA, OMAHA DIVISION

Civil Action No. 76-53

Union Pacific Railroad Company, et al.,

Plaintiffs,

v.

United States of America and Interstate Commerce Commission,

Defendants,

The Denver and Rio Grande Western Railroad Company, et al.,

Intervening Defendants.

Filed Dec. 20, 1954

Final Judgment and Decree

The above-entitled action having come on for final hearing on November 23 and 24, 1953, before Circuit Judges Johnsen and Collet and District Judge Delehant, constituting a District Court of three judges, convened pursuant to Title 28 U. S. C., Sections 2284 and 2325, and all parties being represented by counsel and the Court having received the evidence offered by the parties and heard the arguments of counsel and having considered the pleadings, the evidence and the arguments and briefs of counsel, and the Court being fully advised in the premises and having filed its opinions, findings of fact and conclusions of law herein on October 22, 1954, and the majority of the Court being of opinion that the order of the Interstate Commerce Commission dated January 12, 1953, in its Docket No. 30297, is valid and lawful in part and invalid and unlawful in the particulars set forth in the majority opinion,

Now, therefore, upon the basis of such findings of fact and conclusions of law, and for the reasons set forth in the majority opinion of the Court, heretofore filed, it is ordered, adjudged and decreed that the injunction and other relief prayed for in the complaint be granted and denied, consistent with said findings of fact, conclusions of law and the majority opinion of the Court filed herein;

It is further adjudged and decreed that this Court has no power under the Interstate Commerce Commission Act to determine whether it would be in the public interest and consistent with good transportation practices to put into effect only that part of the order of the Interstate Commerce Commission held to be lawful, without regard to and independent of that part of the order held to be unlawful, and, that question being one which should under the law be determined by the Interstate Commerce Commission in the exercise of its informed judgment in its specialized field;

It is ordered, adjudged, and decreed that this cause be and is hereby remanded to the Interstate Commerce Commission for such further proceedings and orders, consistent with the majority opinion, the findings of fact and conclusions of law, as the informed judgment of the Commission may dictate.

Dated this 20th day of December, 1954.

/s/ JOHN C. COLLET
John C. Collet
Judge
United States Court of Appeals

/s/ JOHN W. DELEHANT
John W. Delehant
Judge
United States District Court

APPENDIX F

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA, OMAHA DIVISION

Civil Action No. 76-53

Union Pacific Railroad Company, et al.,

Plaintiffs,

v.

United States of America and Interstate Commerce Commission,

Defendants.

Filed Dec. 20 1954

Order

Upon consideration of the separate motions for new trial, IT IS CONSIDERED AND ORDERED:

1. That the motions be and they hereby are overruled and denied;

2. That the Clerk transmit forthwith copies of this Order to counsel in this case.

DATED this 20th day of December, 1954.

BY THE COURT:

/s/ HARVEY M. JOHNSEN
Harvey M. Johnsen
Judge
United States Court of Appeals

/s/ JOHN C. COLLET
John C. Collet
Judge
United States Court of Appeals

/s/ JOHN W. DELEHANT
John W. Delehant
Judge
United States District Court

APPENDIX G

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA, OMAHA DIVISION

Civil Action No. 76-53

Union Pacific Railroad Company, et al.,

Plaintiffs,

v.

United States of America and Interstate Commerce Commission,

Defendants,

The Denver and Rio Grande Western Railroad Company, et al.,

Intervening Defendants.

Filed Dec. 20, 1954

Injunction Pending Appeal

Plaintiffs, Union Pacific Railroad Company; Chicago and North Western Railway Company; Chicago, St. Paul, Minneapolis & Omaha Railway Company; Northern Pacific Railway Company; Great Northern Railway Company; The Atchison, Topeka and Santa Fe Railway Company; and Wabash Railroad Company, having filed their application stating that they will appeal to the Supreme Court of the United States from the final judgment and decree entered herein by this Court on December 20, 1954, and praying for an injunction, pursuant to Rule 62(c) of Federal Rules of Civil Procedure, staying and

suspending the operation, enforcement and execution pending final determination of their appeal to the Supreme Court, of the Interstate Commerce Commission's order which is sustained in part by the majority opinion and final decree of this Court;

And it appearing to this Court that unless said order is stayed and its operation suspended and enjoined pending determination of their appeal, each of the plaintiffs and numerous other railroads may be subjected to a penalty of $5,000.00 per day if they do not comply with the requirements of the order, or to irreparable injury from loss of large sums of money in compiling and publishing the required rates and from loss of traffic and revenues, if they do comply with the order;

And the Court, finding no reason for permitting the order to become effective while its validity is being litigated, and being of opinion that the status quo should be preserved by staying and suspending the operation and enforcement of said order pending final determination of plaintiffs' appeal to the Supreme Court, it is hereby

ORDERED, ADJUDGED and DECREED that the order of the Interstate Commerce Commission dated January 12, 1953, in its Docket No. 30297, Denver & Rio Grande Western Railroad Company v. Union Pacific Railroad Company, et al., be and it is hereby stayed, and suspended and the defendants and their officers, agents and employees are enjoined and restrained from enforcing or attempting in any way to enforce said order or any part thereof pending final determination of the

plaintiffs' appeal to the Supreme Court of the United States.

Dated December 20, 1954.

/s/ HARVEY M. JOHNSEN
Harvey M. Johnsen
Judge
United States Court of Appeals

/s/ JOHN C. COLLET
John C. Collet
Judge
United States Court of Appeals

/s/ JOHN W. DELEHANT
John W. Delehant
Judge
United States District Court

APPENDIX H

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA, OMAHA DIVISION

Civil Action No. 76-53

Union Pacific Railroad Company, et al.,

Plaintiffs,

v.

United States of America and Interstate Commerce Commission,

Defendants,

The Denver and Rio Grande Western Railroad Company, et al.,

Intervening Defendants.

Order

This matter having been presented to the Hon. Harvey M. Johnsen, one of the members of the three-member Court which tried the above-entitled cause, on the ex parte motion and application of the intervener, The Denver and Rio Grande Western Railroad Company, for an order enlarging the time to docket the case on appeal and file the record thereof with the Clerk of the United States Supreme Court, and good cause having been shown:

IT IS ORDERED that the time within which the intervener, The Denver and Rio Grande Western Railroad Company, must docket the case and file the record with the Clerk of the United States Supreme Court shall be and hereby is enlarged from April 4, 1955, to June 1, 1955.

IT IS FURTHER ORDERED that the times within which each and all of the other parties or interveners who have filed appeals herein must docket their cases with the Clerk of the United States Supreme Court shall likewise be and hereby are enlarged to June 1, 1955.

March 22, 1955.

/s/ HARVEY M. JOHNSEN
United States Circuit Judge

Filed, District of Nebraska, Mar. 22, 1955

MARY A. MULLEN, Clerk

I certify this to be a true copy of the original record in my custody.
MARY A. MULLEN, *Clerk*

By /s/ Evelyn Copeland
Deputy Clerk (Seal)

APPENDIX I

The Pertinent Provisions of the Interstate Commerce Act (United States Code, Title 49), Involved in this Case are as Follows:

National Transportation Policy—

"It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several states and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

Section 1 (3) (a)—

"* * * The term 'transportation' as used in this part shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit.

ventilation, refrigeration or icing, storage and handling of property transported. * * *"

Section 1 (4)—

"It shall be the duty of every common carrier subject to this part to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; and it shall be the duty of common carriers by railroad subject to this part to establish reasonable through routes with common carriers by water subject to part III, and just and reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers."

Section 1 (5)—

"All charges made for any service rendered or to be rendered in the transportation of passengers or property, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful."

Section 3 (1)—

"It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district,

gateway, transit point region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; *Provided, however*, That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description."

Section 3 (4)—

"All carriers subject to the provisions of this part shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term 'connecting line' means the connecting line of any carrier subject to the provisions of this part or any common carrier by water subject to part III."

Section 15 (1)—

"That whenever, after full hearing, upon a complaint made as provided in section 13 of this part, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of the opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this part for the transportation of persons or

property as defined in the first section of this part, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this part, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this part, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed."

Section 15 (3)—

"The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without complaint, establish through routes, joint classification, and joint rates, fares, or charges, applicable to the transportation of passengers or property by carriers subject to this part, or by carriers by railroad subject to this part and common carriers by water subject to part III, or the maxima or minima, or maxima and minima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the

terms and conditions under which such through routes shall be operated. * * *"

Section 15 (4)—

"In establishing any such through route the Commission shall not (except as provided in section 3, and except where one of the carriers is a water line) require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, (a) unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established, or (b) unless the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation: *Provided, however,* That in prescribing through routes the Commission shall, so far as is consistent with the public interest, and subject to the foregoing limitations in clauses (a) and (b), give reasonable preference to the carrier by railroad which originates the traffic. No through route and joint rates applicable thereto shall be established by the Commission for the purpose of assisting any carrier that would participate therein to meet its financial needs. In time of shortage of equipment, congestion of traffic, or other emergency declared by the Commission, it may (either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleadings by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine) establish temporarily such through routes as in its opinion are necessary or desirable in the public interest."